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No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,

Appellants,

v.

STATE OF TEXAS,

Appellee.

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

As an inherent part of its Scriptural duty to teach the Gospel message and to engage in works of mercy, a church has established homes for distressed adolescent children suffering from severe behavioral disorders. While the Church accepts fire, building occupancy, health, sanitation and safety regulations, it has declined, on the basis of sincerely held religious convictions, to obtain a license for its program of care from the Texas Department of Human Resources as a condition precedent to operating its homes. The homes, employing a distinctive methodology emphasizing spiritual regeneration, were held by the Texas Supreme Court to have "a good record of high quality service", "excellent physical facilities, a dedicated staff, and a list of many children who have been successfully treated by its program".

1. Does forbidding the Church to operate its homes, solely on account of the Church's refusal to obtain a state license for them and to conform them to a state-prescribed methodology and program of care, violate rights of the Church protected by the Free Exercise Clause of the First Amendment?

2. Does application to the Church's homes of the Texas Human Resources Code's licensing and regulatory scheme create excessive entanglements between government and a Church ministry, forbidden by the Establishment Clause of the First Amendment?

3. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, deprive child residents of the homes of due process of law, contrary to the Due Process Clause of the Fourteenth Amendment, by arbitrarily depriving them of vitally needed protection and nurture?

4. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, violate rights of parents, protected by the First and Ninth Amendments, to select a religious

form of care for their children which they deem best suited to help them?

5. Does forbidding the Church to operate its homes, unless it will accept State licensing and the State's methodology of treatment, violate rights of the Church's pastor and staff members, protected by the Free Exercise Clause of the First Amendment, to pursue a religious vocation in the nurture of children?

6. Did the Supreme Court of Texas violate rights of appellants, protected by the Due Process Clause of the Fourteenth Amendment, by arbitrarily setting aside the record facts?

PARTIES

The parties in the court below were:

PLAINTIFF (Appellee here)

The State of Texas

DEFENDANTS (Appellants here)

The Corpus Christi People's Baptist Church, Inc.*
The People's Church
Wiley Cameron
Fay Cameron
Robert Galloway
Frances Galloway
Lester Roloff (deceased)

INTERVENOR DEFENDANTS (Appellants here)

Alexander Forhetz
Janet Forhetz
Michael Gross
Norma Gross
Shari Compton
Stanley Williams
Diane Forhetz
Gaye Gross

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* In accordance with Rule 28.1, The Corpus Christi People's Baptist Church, Inc. states that it is a corporation which has no parent companies or subsidiaries (except wholly owned subsidiaries) or affiliates.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the District Court for the 200th Judicial District of Travis County, Texas, was filed on May 27, 1981. The opinion of that court is unreported and appears as Appendix C hereto. The opinion of the Texas Court of Appeals, filed on April 26, 1984, is unreported and appears as Appendix B hereto. The opinion and order of the Supreme Court of Texas were filed on December 19, 1984 and appear as Appendix A hereto. That opinion is reported at 683 S.W.2d 692 (Tex. 1984).

JURISDICTION

The judgment of the Supreme Court of Texas, remanding the cause to the trial court with instructions to enjoin Corpus Christi People's Baptist Church from operating its child care facilities without a license, was entered on December 19, 1984. On February 13, 1985, the Supreme Court of Texas denied appellants' motion for rehearing. The notice of appeal was filed with the Supreme Court of Texas on April 30, 1985. The jurisdiction of this Court is invoked under Title 28 of the United States Code §1257(2).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

U.S. Constitution, Amendment IX:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

U.S. Constitution, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

TEX. HUM. RES. CODE ANN. §42.001, *et seq.* and §43.001, *et seq.* (See Appendix H).

TEX. ADMIN. CODE tit. 40 §83.601, *et seq.* ("Minimum Standards For Institutions Providing Basic Child Care"). (See Appendix I).

STATEMENT OF THE CASE

Corpus Christi People's Baptist Church operates three residential homes for distressed adolescent children suffering from severe behavioral disorders. (A-16).* The Church declines any local, State or federal funding for its homes, even by way of purchase of service, since it maintains them in fulfillment of a religious duty to teach the Gospel and to engage in works of mercy. (A-12). The homes address the emotional, social, physical and intellectual needs of the children in the setting of a long-term, protective "therapeutic community", whose methodology is essentially spiritual. The children are exposed to a religious way of life, in a disciplined and tranquil environment. (A-17 – A-19). They are placed there by their parents (A-12) and by courts. (Transcript, 121, 155). In the homes' educational program, the children average 1.7 grades above grade level on nationally standardized achievement tests. (A-18). 90% of the children who remain at the homes from three to twelve months have been helped dramatically. (A-19). Graduates of the homes are able to lead useful, productive lives. (*Ibid.*).

In 1979 the State of Texas demanded that the Church homes be licensed and regulated pursuant to §42.001, *et seq.* of the Texas Human Resources Code.[1]

* The signal "A" refers to the appendices hereto.

1. The Code provides no exemption from licensing of religious institutions. §42.001 recites that nothing in the Code shall give a governmental agency power to regulate, or be involved in, "the form, manner or content of religious instruction or the curriculum of a school sponsored by a religious organization." This purpose clause, however, is not an operative part of the statute and is limited to schools, and to "religious instruction" and "curriculum" therein. Similarly, §42.042(k) bars the Department's regulating of "the content or method" of "instruction" or "curriculum" of a religious school. The regulations of the Texas Department of Human Resources hold the homes' religious program of treatment to be fully subject to the regulatory scheme, notwithstanding the statutory provisions respecting "instruction" and "curriculum" in "schools". (A-60 – A-66).

Upon the Church's refusal, the State, on October 11, 1979, brought suit in the 200th Judicial District Court of Travis County, Texas, to enjoin the Church from operating its homes, unless and until it should be issued a license to do so, and to assess civil penalties against the Church of $50 to $1,000 per day (later reduced to $50 to $100 per day) for operating its facilities without a license. (A-46). The defendants, by answer filed November 11, 1979, raised the affirmative defenses that the licensing provisions of the Human Resources Code, as applied to them, were violative of the First, Ninth and Fourteenth Amendments to the Constitution of the United States, and of 42 U.S.C. §§1983 and 1985. (A-46 – A-47).

Four parents of children enrolled in the homes (Alexander Forhetz, Janet Forhetz, Michael Gross and Norma Gross) sought intervention as parties defendant, on the ground of their right and duty to select that form of care for their children which they deem best suited to protect and aid them. Two children, residents of the homes, Diane Forhetz and Gaye Gross, sought intervention on the ground of their desire to remain in the homes and to continue to enjoy the homes' protection and aid. Two staff members, Shari Compton and Stanley Williams, sought intervention on the ground of their desire as Christians to pursue their vocations for the "moral, psychological and physical nurture and regeneration of children who are in severe emotional, psychological and physical distress." The intervenors, in their Plea For Intervention, filed on August 18, 1980, claimed that the Code, as applied to them, violated rights of theirs protected by the First, Ninth and Fourteenth Amendments. Their interventions were granted. (A-48). The trial court judge, on October 31, 1980, personally inspected and viewed the premises of the homes following his granting of defendants' motion that he do so.

Trial on the merits ensued in November, 1980, during which the Church, in briefs and through testimony, explicated its objections, under the Religion Clauses of

the First Amendment, to the application of the Code to its homes: (a) that the regulatory scheme amounts to the displacement of a pervasively religious mode of treatment, meticulously prescribed by the Church, with a secular mode of treatment, meticulously prescribed by the State; (b) that the Church is religiously barred from seeking or receiving a license, or permit, from government to engage in a ministry; (c) that the Department's regulatory scheme, embracing not only the more than 240 separate provisions of the "Minimum Standards" (Tex. Admin. Code tit. 40 §83.601, *et seq.*), but in addition "all requirements" which may be otherwise imposed in the discretion of the Department (A-19), thrusts the State pervasively into the operations of that ministry (A-19–A-28)[2]; (d) that there exists no compelling societal interest demanding State licensing and control of the homes (A-28–A-29); and (e) that the homes, in compliance with fire, health, building occupancy, sanitation and safety laws, are in themselves a successful means for fulfilling society's interest in the protection and regeneration of children (A-15–A-19, A-29).

The Church presented the testimony of child residents of the homes, parents of children enrolled there, alumni of the homes, officials of the Church and administrators of the homes. It also presented two expert witnesses in the field of child care — Dr. Robert Mendelsohn, a Chicago-based pediatric physician who had served as Senior Pediatric Consultant to the State of

2. More specifically, the Church objected to features of the Code and its multiple standards as not only subjecting its homes wholly to secular control, but determining features of the life of the homes which the Church deems essential features of its ministry: qualifications of staff, the plan of care, relationships between child and staff and between the homes and parents. It further objected to regulations requiring children to participate in community functions and recreational activities; imposing regulations discordant with Church requirements relating to dress, to evaluation of communications between children and parents, to modes of discipline, to confidentiality of church records, etc. (A-24–A-27).

Illinois Department of Mental Health and was national director of medical consultation services of Project Head Start; and Dr. Marie Gatza, Director of Training, Catholic Social Services of the Roman Catholic Archdiocese of Philadelphia. The trial court found the testimony of these experts to establish: (a) that there exists no professional consensus as to goals and methods to be used for the treatment of children with behavioral disorders; (b) that a spiritual methodology, such as the homes employ, which inculcates "belief in God -- a belief in one's dependence on God, one's living God's commandments and being sorry when one doesn't" can be very important to the mental health of children; and (c) that the "social work methodology" of secular state agencies does not and cannot speak to the spiritual dimension as a basic factor in the regenerating of children. (A-28–A-29).[3] The historic roots of Christian practice in saving and nurturing lost children, and the Scriptural objections to licensing of ministries, were detailed by an expert witness, the theologian Dr. Rousas J. Rushdoony. (A-14, A-25).

The Church also called as hostile witnesses principal officials of the Department of Human Resources in an effort to elucidate the meaning of statutory provisions and regulations — *e.g.*, Code §43.004(4)(A) dealing with the qualifications of a "child care administrator" and whether such interchangeably used terms as "plan of care", "plan of operation", "operational program", "min-

3. Neither the statute nor the Minimum Standards allow for religious variation from the plan of care prescribed by the Department. (See Findings of Fact Nos. 69, 70, 71, 73, 74, 75, 77, 81, 82 and 87, at A-19–A-23). The Code's provision for waiver, or variance, §42.042(j), does not allow exemption from licensing and, because it permits variances only for reasons of "economic impact", does not admit of any distinction based upon religion. See Defendants' Exhibit No. 25, which is the Department's denial of a request for a variance by Mother Teresa Santoyo, Superior General, Society of Christian Social Service, Corpus Christi, in order to protect the confidentiality of her religious ministry in relation to children's records. (Transcript, 211-213).

imum standards" and "all requirements" had the same or different meanings. (Transcript, pp. 196-207). The State, presenting no testimony to support its claim that application of the Code to the homes was necessitated by a compelling state interest or that it was the least restrictive means available, called as its witnesses one employee of the Department and two administrators of state-aided religiously affiliated institutions. The latter two testified, *inter alia,* that they believed it not necessary that a home for children be licensed in order to provide good child care. (A-29).

The district court, on May 27, 1981, having made findings of fact and conclusions of law, entered judgment in favor of defendants. (A-76–A-77). The court declared that the state licensing requirement was unconstitutional in its particular application to the Church's homes. Specifically, the court held that application of the Code's licensing requirement to the Church in the exercise of its ministry for the regeneration of distressed children constituted a prior restraint and violation of the Free Exercise rights of the pastor, the Church, the parents and staff members; that such application violated the Fourteenth Amendment's Due Process Clause by denying the children the right to enjoy the means of regeneration offered by the Church's homes; that the licensing-regulatory scheme created excessive entanglements between church and state forbidden by the Establishment Clause; and that such application violated 42 U.S.C. §1983, as well as the Ninth Amendment. (A-72–A-74).

The State appealed to the Texas Court of Appeals which, on April 26, 1984, affirmed, one judge dissenting, (A-11–A-44). The court noted that

> "[t]he trial court's Findings of Fact are not challenged on appeal. Therefore, they are binding on the parties and us and they become the facts of

> the case. Crain v. Hill Co., 613 S.W.2d 367, CCA (Waco) NRE 1981. They support the judgment."

(A-31).

The State appealed to the Supreme Court of Texas, which, on December 19, 1984, within one week following oral argument, reversed. That court stated, in part:

> "The issue is not whether People's Baptist is performing a service that falls beneath licensing standards. The three homes have a good record of high quality service."

(A-1–A-2). Again,

> "The record reveals that People's Baptist has provided excellent physical facilities, a dedicated staff and a list of many children who have been successfully treated by its programs."

(A-6). The court rejected the holdings of the two courts below with respect both to the Establishment Clause and the Free Exercise Clause.[4] It stated that the Church's reliance on the Establishment Clause was "misplaced", holding that the teaching of the Supreme Court of the United States on "excessive entanglements" addressed solely situations in which religious institutions are governmentally aided and not in which they are governmentally regulated:

> "The Establishment Clause cases address the issue of whether some form of government *aid*,

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4. The court pointed to the case of *Roloff Evangelistic Enterprises, Inc. v. State*, 556 S.W.2d 856, *appeal dismissed*, 439 U.S. 803 (1978), as a case in which a "predecessor" of the Church had contended that the licensing act "impinged on the corporation's free exercise of religion". (A-2). The Texas Supreme Court did not, however, find that case controlling. The trial court judge in the present case, who had also been the equity chancellor in the *Roloff Evangelistic Enterprises* case, held the former (in which no trial record was made) to be an "entirely different case" involving different parties and different issues. (A-48).

> either direct or indirect, to a religious institution violates the Establishment Clause" [citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970)]."

(A-3). (Emphasis by the court). The court held that if it exempted religious institutions from the licensing requirements but not non-religious institutions, it would, "arguably", be violating "the second-prong of the Establishment Clause test because the primary effect would be to advance religion", *i.e.*, the State would be treating two classes of institutions unequally. (A-4). The court refused to treat the "excessive entanglement" issue separately from its Free Exercise analysis, instead identifying the "least restrictive means" test under the Free Exercise Clause with the "excessive entanglement" prohibition of the Establishment Clause. (A-4 – A-5).

Rejecting the Free Exercise claims of the Church and the other appellants (and by implication Findings of Fact by the trial court and the Court of Appeals Nos. 99 through 126 (A-24–A-28)), the Texas Supreme Court said that the facts that the homes are "excellent facilities", have a "dedicated staff", and have "successfully treated many children", "show how readily the homes can be approved for licensing." (A-6). The court ignored the trial court's conclusion that the State had failed to prove a compelling interest and held "that, as a matter of law, the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm." (*Ibid.*). The court further stated "[t]he State has a right and a duty to protect and nurture its minor children. *Prince v. Massachusetts*, 321 U.S. 158 (1944) . . ." The court held that since a state interest in the welfare and nurture of children was delineated in the purpose clause of the Human Resources Code, therefore, application of the Code to the Church's homes was justified by that interest. (*Ibid.*).

Finally, the court held that, since "no entity other than the State" can carry out the responsibility to protect children, the Code's licensing-regulatory scheme is the least restrictive of the alternatives which the State has. (A-7).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case is one of first impression in this Court. It involves nationally significant constitutional issues and presents them here in light of a fully developed factual record. The opinion of the Texas Supreme Court conflicts with basic teachings of the Supreme Court of the United States. Its judgment, if allowed to stand, will destroy an ongoing and beneficent resource, and promise chaos in the lives of the children and families involved. This appeal tests the ultimate question of whether the state shall have total governance of religious institutions for the care of children.

1. None of the first five Questions Presented has received plenary review by this Court.[5] The First Amendment issues which they frame, relating to liberties of churches and rights of parents to choose a religious program of treatment of children, go to the core of First Amendment concerns. Those issues are certainly not less significant than questions arising under the Religion Clauses which the Court has recently addressed pertaining to a municipal creche display (*Lynch v. Donnelly*, ____U.S. ____, 104 S.Ct. 1355 (1984)), a church's power to veto a liquor license (*Larkin v. Grendel's Den,*

5. While the Texas Supreme Court refers to *Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 608 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980), it correctly does not cite it as controlling. *Heart Ministries*, unlike the present case, involved a facial attack on a statute — *i.e.*, as invalid in all of its applications to any institutions whatever. No church, parents, children or staff were parties asserting constitutional interests separate from those of the institution involved. No issue under the Establishment Clause was raised nor issues of parental rights, rights of children, of churches or religious vocational rights.

Inc., 459 U.S. 297 (1983)), or such First Amendment questions as the rights of speech and association considered in *Federal Election Commission v. National Conservative Political Action Committee*, ____U.S. ____, 53 U.S.L.W. 4293 (U.S. March 19, 1985).

2. If this Court should summarily affirm the decision from which this appeal is taken, it will have created a precedent, of national effect, which, at the least, will call into doubt basic prior teachings of this Court on the Free Exercise and Establishment Clauses. As to the former, in this case a state supreme court has plainly disregarded this Court's teachings with respect to the state's burden of proof relating to compelling state interest and least restrictive means. Upon the trial, the State presented no evidence on these issues. The Texas Supreme Court thus espouses the position rejected by this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), namely, that the fact that a legislature has enacted a statute for the protection of children is, without more, proof absolute that a compelling state interest justifies its application in all instances.

In *Yoder*, the Supreme Court stated categorically that it could not accept a "sweeping claim" of the importance of compulsory education, but rather was compelled to "searchingly examine" the State interest in the particular requirement at issue. 406 U.S. at 221. In this, the Court was greatly guided by the testimony of experts in the fields of education and religion. *Id.* at 209. This evidence demonstrated that the education provided Amish children was highly successful in terms of preparing them for life (*id.* at 224), and that State claims to the effect that children would not be adequately protected were "speculative" when compared to the evidence on the record. *Ibid.* The Court stated that the State had failed to produce "evidence" to support its position. *Id.* at 224-225. This evidence must consist, said the Court, of a "particularized showing" of harm to children, *id.* at 227, and any claims based upon the State's duty as

parens patriae, must be examined on the evidence "as revealed in this record". *Id.* at 229.

That the record in *Yoder* was insufficient to support the State claims is summarized in the following significant passage:

> "This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in evidence."

Id. at 230. And, ultimately, the Court stated:

> "[I]t was incumbent on the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."

Id. at 236.

The Texas Supreme Court has written a new and arbitrary test for making determinations under the Free Exercise Clause. The salutary principle of judicial deference to the legislature is here badly distorted by the Texas Supreme Court. Further, the court below misconstrued the Supreme Court's conception of compelling state interest by concluding that the existence of such an interest is purely "a matter of law" (A-4) — this in the face of extremely detailed findings of fact based upon the trial record that belie any compelling interest of Texas in imposing its licensing-regulatory scheme upon the homes of Corpus Christi People's Baptist Church. (A-29). In deed Section 42.042(j) of the Code contradicts the claim of "compelling State interest" by authorizing waiver of any requirement if the "economic impact" of compliance would be "impractical". Thus the Code itself

subordinates its purported concern for the welfare of children to mere considerations of cost.

Furthermore, the Texas Supreme Court contradicts this Court's teaching on the Establishment Clause, stating:

> "The Establishment Clause cases address the issue of whether some form of government *aid*, either direct or indirect, to a religious institution violates the Establishment Clause."

(A-3). (Emphasis by the court). But in *Lemon* and the other "entanglement" cases, the principle was not that the entanglement was forbidden because it involved aid, but that the aid was forbidden because it involved entanglement. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).[6]

Incomprehensible, but, again, at odds with the teachings of this Court, is the rule of constitutional law set forth by the Texas Supreme Court when it holds that the "excessive entanglement" question is to be addressed under Free Exercise analysis since resort by the State to anything more than the "least restrictive means" results in excessive entanglements. (A-5). The entire treatment by the Texas Supreme Court of the Religion Clause questions which were before it reflects a total dis-

6. The Texas Supreme Court relies, in part, upon the decision of the United States Court of Appeals for the Fourth Circuit in *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984), as support for its ruling that exempting the Church's homes would arguably have the primary effect of advancing religion, in violation of the Establishment Clause. Under this view the Establishment Clause forbids any accommodation of religious liberty not absolutely mandated by the Free Exercise Clause. But that view was clearly rejected by this Court in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and in *Thomas v. Review Board*, 450 U.S. 707, 719-720 (1981), and by the federal district court in *Arkansas Day Care Association, Inc. v. Clinton*, 577 F.Supp. 388 (E.D. Arkansas 1983) (a case reaching a conclusion directly contrary to *Forest Hills*, though addressing similar facts and issues).

regard of the requirement that "when the First Amendment is involved, our standard of review is 'rigorous'." *Federal Election Commission, supra,* at 4299.

Moreover, the Texas Supreme Court opinion distorts the meaning of *Prince v. Massachusetts,* 321 U.S. 158 (1944). *Prince* stands for protection of the child. That, too, is the essence of the Church's case. But the Texas Supreme Court would expand *Prince* to mandate, with no exceptions, total government control of all child care — in the absence of any proof that the State's methodology is effective or even that it is superior to other methodologies. Indeed, that court says that the State has "the right and duty to protect and nurture *its* minor children" — as though the children placed by their parents in the Church's homes belong to the State and not to their parents. (A-6). It is precisely this kind of "sweeping claim" of *parens patriae* that this Court has discountenanced. *Yoder, supra,* at 221, 234.

3. Three courts below have passed upon the conflicting claims in this case. Two ruled in favor of appellants. Extensive discovery, particularly as related to the issues of excessive entanglement and compelling state interest, had preceded the trial. The trial court, having viewed the premises and observed the witnesses, studied the record and made detailed findings of fact supportive of the position of the appellants and adverse to the claims of the State. The Texas Court of Appeals, agreeing, confirmed those findings of fact.[7] The Texas Supreme Court, faced by appellants' good faith assertions of federal right, ruled adversely on those federal claims by ruling contrary to the established facts.[8] That court, for ex-

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7. Citations to the Appendix, pages A-12 through A-29, are to the Findings of Fact by the Texas Court of Appeals. Article 5, §6 of the Texas Constitution provides that the decisions of Texas Courts of Appeals "shall be conclusive on all questions of fact brought before them on appeal or error."

8. Such arbitrary treatment offends the procedural due process requirement of "fundamental fairness" in the resolution of disputed

ample, attacked the Church's religious objections relating to licensing and methodology, stating that "[t]he homes can comply with the law's modest requirements that are mandatory for all other homes." (A-7–A-8). That is flatly contradicted by the record which shows that the Church — because its fundamental religious convictions clash directly with numerous statutory and regulatory provisions — can*not* comply with the law's (pervasive) requirements. (A-24 – A-28).[9] Adherence to religious principle is at once the *sine qua non* of the Church's success in its work for children and the immovable obstacle to its accepting licensing.

The Texas Supreme Court ignored the findings of the trial court and Court of Appeals with respect to compelling state interest. (See A-28–A-29). As the Court of Appeals had noted, the State had utterly failed to prove the existence of such an interest. Instead, it had been demonstrated that the State sought to affix upon the Church's homes "a regulatory mass which the Chief Administrator [*i.e.*, the Commissioner of Human Resources] could not justify, or, in important instances, even explain." (A-32).

Misconceiving the teachings of this Court on "excessive entanglements", the Texas Supreme Court again

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matters involving fundamental liberties. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

9. In place of the record evidence, the Texas Supreme Court substitutes an *argument* — namely, that the Church's objection to the licensing-regulatory scheme cannot be bona fide since the Church accepts incorporation. Incorporation is purely discretionary with the Church under Texas law. The Church existed legally before incorporating and would continue to exist after dissolution of corporate status. Incorporation, unlike a license under the Code, is not a *permit to exist* and involves no State management or close supervision of the corporation's activity. Fire, building occupancy, health, safety and sanitation permits (which the Church believes to be justified by a compelling state interest) do not directly relate to program, or remotely carry with them the regulatory freight involved in the Code's licensing system.

ignored the record findings. As to this, it is respectfully suggested the Court closely review the facts as disclosed in the findings (A-19 – A-24) which show that the regulatory scheme necessitates a program of sustained and detailed surveillance and intrusion by the State with respect to the Church's homes. This has included the use of undercover investigators posing as Church members attending worship services at the homes, reporting contents of sermons, contacting children residing in the homes to solicit code-worded communications from them, and the use of binoculars, cameras and tape recorders to solicit information about persons connected with the Church. (A-23 – A-24). Further, the Texas Supreme Court ignored the fact that state licensing representatives instigated rebellious and destructive behavior on the part of children in the homes by criticizing the Church's programs of care. (A-65).

4. The outcome of this appeal will directly affect, for good or ill, the future lives of those 250 children now resident at the Church's homes, as well as the lives of their families. For many of these children residence in State homes had accomplished nothing (A-12), and for most, the Church's homes are a last avenue of hope. (A-28).

This appeal thus asks whether, in this era of national distress over drug abuse, violence, suicide, crime and other behavioral disorders among American youth, a "high quality service" for such youngsters, with "excellent physical facilities, a dedicated staff" and a record of success in treatment of them (at great savings to taxpayers) shall be shut down on the basis of speculative assumptions by the Texas Supreme Court respecting abuses that might be practiced by other religious institutions.[10] (*Cf.*, decision of the trial court, A-49).

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10. This Court has already, in clear terms, turned aside a similarly restrictive view limiting fundamental freedoms closely allied with those here at stake:

One result, if the Texas Supreme Court decision is allowed to stand uncorrected, will be to inform welfare departments in all fifty states that they have an absolutely free hand to totally control church child care agencies, even though those ministries do not participate in governmental funding, and irrespective of the fact that they represent a real-life "least restrictive means" for the regeneration of distressed children.

At core this appeal tests the question of whether methods of rehabilitation of "terminal" children, other than secular methods prescribed by the state, may be employed in our society and whether child care institutions not controlled by the state (except as to fire, health, building occupancy, safety and sanitation measures) shall have liberty to exist.

> "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."

Parham v. J.R., 442 U.S. 584 603 (1979). (Emphasis in original). As with parental rights, so too with religious rights: abuses thereof should be corrected by remedial measures pinpointed to the practice at issue. Overly broad attempts should not be made to prevent abuses by decreeing programs of prior restraint and total control, thus extinguishing the liberties of non-transgressors.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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May 14, 1985

84-1791

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No. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,

Appellants,

v.

STATE OF TEXAS,

Appellee.

On Appeal From the Supreme Court of Texas

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. C-3265

THE STATE OF TEXAS, *Petitioner*	:	
	:	From Travis County,
v.	:	
	:	Tenth District.
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. et al., *Respondents*	:	December 14, 1984

The State of Texas sued Corpus Christi People's Baptist Church (People's Baptist) seeking to enjoin it from operating the Rebekah Home for Girls, the Anchor Home for Boys, and the Lighthouse Home for Boys, unless and until People's Baptist obtains a license for that purpose from the Department of Human Resources (DHR). Some members of the staff of the homes, some children and parents have intervened as defendants. The questions presented for review are whether the state licensing procedure for child-care facilities violates the Religion Clauses of the United States Constitution's First Amendment, the Ninth Amendment, 42 U.S.C. 1983, and various articles of the Texas Constitution when applied to church-operated facilities. The trial court, in a non-jury trial, denied the State's prayer for injunction, concluding that the licensing scheme, as applied to People's Baptist, violated both the United States and Texas Constitutions. The court of appeals, with one justice dissenting, affirmed the judgment in an unpublished opinion. We reverse the judgments of the courts below and remand the cause to the trial court with instructions.

The issue is not whether People's Baptist is performing a service that falls beneath licensing standards. The

three homes have a good record of high quality service. People's Baptist, from this record, could no doubt easily satisfy licensing requirements, but has chosen not to do so. It reasons that licensing interferes with religious freedom. People's Baptist does not, however, resist all licensing to do business in Texas. In fact, it does its business and service as a corporation under the corporate name of Corpus Christ People's Baptist Church, Inc., and it complies with all business licensing requirements.

The issue, therefore, is a narrow one. It is one that Texas courts have twice before decided adversely to People's Baptist or its predecessor in title. *Roloff Evangelistic Enterprises, Inc. v. State*, 556 S.W.2d 856 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978); *Oxford v. Hill*, 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref'd). In *Roloff*, the court rejected the argument that the licensing act impinged on the corporation's free exercise of religion. In *Oxford*, the court refused to sustain an employee's contention that the Act violated his First Amendment rights. This third effort to achieve a different result was occasioned by a transfer of ownership of the homes to Corpus Christi People's Baptist Church, Inc. by the former owner, Roloff Evangelistic Enterprises, Inc. Reverend Lester Roloff forthrightly explained the reason for the transfer to the corporate church: "Instead of (the State) jumping on the (Evangelistic) Enterprises, you will be fighting with the church from here on . . . ." We have substantially the same cause before us again, prompted only by a change of ownership.

The licensing of child-care facilities operating in Texas is required as a part of the state program to protect the health, safety and well-being of children residing in those facilities. The declared purpose of the licensing requirement to establish statewide minimum standards through a licensing program. TEX. HUM. RES. CODE ANN. §42.001. The licensing act includes this statement:

> It is also the intent of the legislature that freedom of religion of all citizens is inviolate, and nothing in this chapter gives a governmental agency authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization.

Id.

People's Baptist contends that the Texas licensing scheme violates the Establishment Clause of the United States Constitution's First Amendment because it creates "excessive entanglement" between church and state. The Clause provides: "Congress shall make no law respecting an establishment of religion . . . ."

The U.S. Supreme Court has enunciated a three-pronged test to determine whether governmental action violates the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The purpose of the Establishment Clause is to protect against state "sponsorship, financial support, and active involvement" in religious activity. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

People's Baptist's reliance on the Establishment Clause is misplaced. The Establishment Clause cases address the issue of whether some form of government *aid*, either direct or indirect, to a religious institution violates the Establishment Clause. *See e.g., Meuller v. Allen*, ____U.S. ____, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983) (statute allowing parents tax deduction for expenses incurred in sending their children to parochial schools); *Lemon* (statute providing state aid in form of salary supplements, textbooks and instructional material for nonsectarian subjects); *Walz* (statute granting prop-

erty tax exemptions to religious organizations for religious properties).

Unlike the traditional Establishment Clause cases, this case involves government *regulation* of a child-care institution which is part of the church ministry. This distinction is important for two reasons. First, to accept People's Baptist's argument and invalidate the licensing and regulatory scheme because of "excessive entanglements" would create a dilemma in applying the three-pronged Establishment Clause test; the second prong would be at odds with the third. Requiring nonreligious child-care facilities to comply with the state licensing and regulatory scheme while exempting religious facilities would result in unequal state treatment of the two classes of institutions. This unequal treatment could, arguably, be impermissible under the second-prong of the Establishment Clause test because the primary effect would be to advance religion.

Second, state licensing and regulation is a type of entanglement that differs from the entanglement discussed in the traditional Establishment Clause cases. In those cases, the State must examine and determine what programs are religious and what programs are secular to ensure that government aid reaches only the nonreligious ones. In our case, the state regulatory scheme prohibits inquiry into the religious content of the homes' curriculum. The purpose of these regulations is to assure that all child-care facilities, secular and nonsecular, meet certain minimum standards in areas such as financial solvency, staff-child ratio, nutrition and medical care.

We hold that the licensing requirement does not offend the Establishment Clause. A more appropriate and direct means of questioning the constitutionality of this government regulation is through the First Amendment's other religion clause, the Free Exercise Clause. *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 238 n. 6 (1984). The Free Ex-

ercise test contains all of the safeguards required to protect People's Baptist's interest without the inherent traps found in an Establishment Clause review of a case like this where the government imposes regulations without conferring corresponding benefits. Under a Free Exercise Clause analysis, the problem of "excessive entanglement" between church and state will, in effect, be addressed. If government regulation is proper because the State has a compelling interest, the regulatory scheme will nevertheless be invalid unless the State uses the least restrictive means. Anything more than the least restrictive means will result in an "excessive entanglement."

The First Amendment's Free Exercise Clause provides that Congress shall make no law "prohibiting the free exercise" of religion. The State contends that licensing of the child-care facilities does not violate People's Baptist's right to the free exercise of its religion. We agree.

While there is an unqualified prohibition against government interference with beliefs, governmental regulation may lawfully impose an incidental burden on otherwise protected religious conduct. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). A balancing test is employed by the courts to determine when government may regulate certain conduct prompted by religious beliefs or principles. *Yoder* at 221; *Sherbert* at 403, 406. First, the party complaining of a Free Exercise Clause violation must show that the regulations under review impose a substantial burden on the exercise of his religion. Second, if the complaining party demonstrates that it is burdened by the regulations, then the State must have a compelling state purpose for the laws. Relevant to this prong of the test is an inquiry into whether there exists a less restrictive alternative to the regulation.

The trial court based its judgment, in part, on the State's failure to prove a compelling interest. We hold that, as a matter of law, the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm. This compelling State interest outweighs the burden imposed upon People's Baptist by the licensing requirements.

The State has a right and a duty to protect and nurture its minor children. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jones v. Alexander*, 59 S.W.2d 1080 (Tex. 1933). The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of these children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled by the institution. The staff at the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives.

The State's special concern for the welfare of these children is reflected in the Human Resources Code. The State's interest in assuring that these children's basic needs are met and that their basic rights are protected is paramount. *Oxford v. Hill*, 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref'd); *Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 608 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980).

The record reveals that People's Baptist has provided excellent physical facilities, a dedicated staff and a list of many children who have been successfully treated by its programs. These facts show how readily the homes can be approved for licensing. If the State is prohibited from licensing these child-care facilities on religious grounds, it will be prohibited from licensing other facilities claiming the same religious exemption. Children in the homes of some institutions may become the victims of neglect, injury, cruelty, or degradation in the name of spiritual

regeneration. The State would, under People's Baptist's theory, be powerless to intervene.

Licensing and regulation of child-care facilities are the least restrictive of the alternatives that the State could provide for the protection of children. Without these procedures the State could not gather vital information about a child-care facility that it must have to fulfill its duty to protect the health and well-being of the children residing there. No entity other than the State can carry out these responsibilities for the public.

The Human Resources Code protects religious child-care facilities from State intrusion into protected areas. Section 42.001 expresses the intent of the legislature that freedom of religion is inviolate. Section 42.042(k) prohibits the DHR from regulating or attempting to regulate or control "the content or method of any instruction or curriculum of a school sponsored by a religious organization." The regulations provide the least restrictive means of achieving the State's compelling interest in promoting the health, safety and welfare of the children residing in child-care facilities.

We have considered all of People's Baptist's remaining arguments: that state licensing and regulation of these homes would violate the Ninth Amendment of the U.S. Constitution; 42 U.S.C. 1983; article I, sections 3a, 6 and 19; article II, section I; and article III, section 1 of the Texas Constitution. We conclude that the State's regulatory scheme does not violate these provisions. Based on the foregoing holdings, we need not reach the State's third point of error.

These cases have been debated and litigated for a number of years upon the claim that the State seeks to regulate religion. This record and those of the two prior cases show that the issue is a spurious one. The State has manifested complete disinterest in the religious doctrines that People's Baptist has in the past or may in the future expound. The homes can comply with the law's modest requirements that are mandatory for all other

homes. A decision to close the homes will be that of People's Baptist, not the State.

We reverse the judgments of the courts below and remand the cause to the trial court with instructions to enjoin People's Baptist from operating these homes unless and until such time as it procures a license from the State.

Jack Pope
Chief Justice

OPINION DELIVERED:

December 19, 1984

A-9

No. C-3265

THE STATE OF TEXAS, *Petitioner*	:	
	:	From Travis County,
v.	:	
	:	Tenth District.
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. et al., *Respondents*	:	December 14, 1984

This cause was heard on writ of error from the Court of Appeals for the Tenth Supreme Judicial District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

It is the opinion of the court, (authored by Chief Justice Pope), there was error in the judgments of the courts below which denied the State's prayer for injunction as the State has no interest in the religious doctrines that People's Baptist has had in the past or in the future. However, the State has a compelling interest in protecting the children in child-care facilities as to health, safety, and well being.

In accordance with the opinion of this court,

it is ordered that:

1) the judgments of the court of appeals and the trial court are reversed.

2) The cause is remanded to the trial court with instructions to enjoin the Corpus Christi People's Baptist Church from operating the three homes until such time as it procures a license from the State.

3) Corpus Christi People's Baptist Church, Inc. et al. shall pay the costs in this court and the court of appeals.

4) The State of Texas shall recover the costs it incurred in those courts from Corpus Christi People's Baptist Church, Inc. et al.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Travis County, Texas for observance.

(Opinion by Chief Justice Pope)

APPENDIX B

AFFIRMED 26 APRIL 1984
NO. 10-83-128-CV

Trial Court
297,248

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

THE STATE OF TEXAS,

Appellant

v.

CORPUS CHRISTI PEOPLE'S
BAPTIST CHURCH, INC, et al.,

Appellees

From 200th Judicial District Court
Travis County, Texas

OPINION

This is an appeal by plaintiff State of Texas from denial of all relief sought by plaintiff in its suit for injunction to enjoin defendants Church, et al, from operating its child care facilities in the State of Texas, unless and until defendants are issued a license for that purpose by the Department of Human Resources.

The issue presented is whether or not the State can enforce its licensing requirement for child care facilities against the Homes owned and operated by the Corpus

Christi People's Baptist Church, under the record in this case.

Trial was to the court. After hearing the court rendered judgment plaintiff take nothing.

The trial court filed Findings and Conclusions substantially as follows:

FINDINGS OF FACT

I. *Mission and Operation of the Church Homes:*

(1) The operation of shelters for the needy, and Homes for the rescue of children is enjoined upon the Corpus Christi People's Baptist Church by its organizational documents.

(2) The Church, which adheres to the tenents of fundamentalist Christianity, owns and operates the Rebekah Home for girls in Corpus Christi and two Homes for boys.

(3) The Homes are operated as an integral part of the religious ministry of the Church and would not otherwise exist.

(4) The Church maintains the Homes in fulfillment of its religious duty to engage in works of mercy, salvation and eradication of sin.

(5) The mission of the Church's Homes is to produce a conscious turning away from sin [by] the children who reside there.

(6) The Church and the Homes, for Biblical reasons, do not accept any local, state or federal funds.

(7) The children at the Homes are placed there by their parents; the Homes carry out a Scriptural responsibility to these parents for the care and Christian nurture of the children.

(8) Parents of the children who reside at the Homes often have turned to the Homes in desperation over the failure of public institutions to aid their children.

(9) In operation of the Homes for the rescue of children, the Church is religiously commanded to employ only those methods which are based upon and are consistent with the following beliefs:

(a) The King James Bible is the inspired, only infallible authoritative Word of God.

(b) There is one God manifested in the three personalities of Father, Son and Holy Spirit.

(c) Satan is a real personality and he presently controls unregenerate man.

(d) Jesus Christ is God, who was born of the Virgin Mary and to the human family, lived a sinless life, performed wondrous miracles, died a vicarious death as an atonement for the sins of the world; and who was resurrected bodily and did ascend bodily to the right hand of the Father; and who will return one day to this earth personally, literally, bodily.

(e) Having fallen from his blessed state with God, man is morally and spiritually depraved, a sinner by birth and by choice.

(f) Sinning man must be cleansed from his sin by the blood of Christ, changed from his evil nature by the Spirit of God, and indwelt by God himself in order to be a Christian.

(g) Believers will be resurrected into everlasting life and blessing in heaven.

(h) Unbelievers will be resurrected into everlasting punishment and torment in hell.

(i) The only permanent solution for crime, drug abuse and general rebellion against society is a transformed life made possible through personal faith and trust in Jesus Christ.

(10) Fundamentalist Christianity began in the 1890's as an effort to counter modernist tendencies in the major protestant communions, namely the questioning by those communions of scriptural commands and of the deity of Christ.

(11) Homes for the care of troubled children are a vital aspect of the fundamentalist Christian faith community, and are an expression of religious concern which dates back to the early centuries of the Church.

(12) The practice of saving and nurturing lost children which has been undertaken at the Church's Home is one which is historically traceable to the early days of the Christian Church and is an expression or manifestation of the Christian religion.

(13) In early Christian times, Christians would rescue and nurture children of failed abortions and other abandoned children, and these practices were considered a reproach to the practices of the Roman government.

(14) The Christian Church's effort to educate young children in a religious school is essentially the same effort as regenerating troubled youth, as both seek to bring about the conversion to Christian beliefs, that is being "born again."

(15) The Corpus Christi People's Baptist Church was founded in 1969.

(16) Complete ownership and operation of the Homes was transferred to the Church by Roloff Evangelistic Enterprises.

(17) Roloff Evangelistic Enterprises gave up operation of the Homes in 1979 in order to make it clear that the Homes were the ministry of the Church of Christ.

(18) Roloff Evangelistic Enterprises is not governed by any Church, nor is it part of or affiliated with Corpus Christi People's Baptist Church. Upon dissolution of Roloff Evangelistic Enterprises, a charitable corporation, its assets go to churches in Garland and Houston.

(19) Corpus Christi People's Baptist Church is not the alter ego of Roloff Evangelistic Enterprises.

(20) Rev. Lester Roloff is an ordained minister of the Gospel, and is pastor of Corpus Christi People's Baptist Church.

(21) The pastor of Corpus Christi People's Baptist Church serves at the pleasure of the members, and can be removed by majority vote.

(22) Rev. Wiley Cameron is president of the Board of trustees of the Church.

(23) Rev. Cameron and his wife Fay are the superintendents of the Rebekah home.

(24) Stan Williams is employed by Corpus Christi People's Baptist Church as superintendent of the Lighthouse Home for boys.

(25) Administrators of the Church's Homes provide Christian counsel to the residents as part of their vocational calling, and in furtherance of the religious mission of the Homes.

II. *The Care Provided to the Children at the Church's Homes:*

(26) Every aspect of the Homes operated by the Church is based on Biblical principle and is designed to inculcate, strengthen and enforce religious instruction and religious formation in the residents and staff of the Homes.

(27) The Church bases its treatment of the children on its recognition that their problems, whether dope addiction, alcohol or rebellious behavior, are only symptoms of spiritual disorder.

(28) In keeping with the beliefs of fundamentalist Christianity, the Church's Homes view the source of the problems of distressed children as rooted in the sinful nature of man. This contrasts with the medical model of dealing with delinquent children whereby the problems are seen not as sin but as a lack or imbalance in educa-

tion or environment and the thrust of treatment is to remedy that lack. The difference between the two approaches is religious.

(29) The foundation of the successful treatment of the children who reside at the Homes is the establishment of their recognition of their spiritual relationship to their Creator and with all others who are children of the Creator.

(30) Christianity provides a value system and a framework of values necessary to the treatment of the children who reside at the Church's Homes.

(31) Expert testimony establishes that effecting a conscious turning away from sin has been proven to be an effective method in overcoming the problems in which aberrant behavior is rooted.

(32) The children who are brought to the Church's Homes are suffering from the most severe problems imaginable.

(33) Such children have various types of behavior disorders, problems with alcohol, drugs, sex problems, exhibit anti-social behavior, are run-aways, and have academic problems.

(34) When children come to the Homes, they are often rebellious and opposed to any form of authority.

(35) Expert testimony establishes it is essential that children who are severly distressed be treated in a situation where discipline and authority are important components of the community.

(36) There is a distinctly Christian approach to the discipline of unruly adolescents. Such approach is characterized by love, respect for the dignity of the person of the child, a sense of community, the opportunity for fellowship, sharing and service, prayer, and belief in the power of prayer.

(37) The Christian approach to treatment of disturbed children is practiced at the Homes.

(38) Corporal restraint is occasionally, but rarely, used when a child comes to the Homes in a state of violence, or with self-destructive impulses.

(39) Mild corporal punishment is used as part of the Biblically-based teaching and function of the Homes, but only as a last resort when non-corporal means have failed.

(40) Residence in a "therapeutic community" is best for treatment of adolescents with problems, and involves full-time residence in a long-term closed community with emphasis on the changing of behavior, where all rules, personnel and programs are geared to the treatment of the child for 24 hours per day. Such treatment, practiced at the Church's Homes, addresses the intellectual, social, spiritual, emotional, and physical as part of a unified whole.

(41) Spiritual treatment bears a great deal of importance to the mental health of disturbed adolescents.

(42) In the spiritual regeneration of children, it is vital to have persons who act as religious role models, such as staff and teachers.

(43) The staff at the Homes is chosen on the basis of Scriptural beliefs. Only Christians who claim to have been "born again" are employed.

(44) The program for treatment of children at the Homes is rooted entirely in the commands of the Bible.

(45) The children are exposed to a religious way of life which is based on love and caring.

(46) As part of the program for spiritual regeneration, the children go to school during the day, attend church 3 times a week, have Bible study and Bible memorization the remainder of the week.

(47) The children receive Christian education on the premises by means of the Accelerated Christian Education program.

(48) The Accelerated Christian Education curriculum is an individualized instruction program in which

the children are tested to discover their learning level, and are permitted to work at their own pace.

(49) Despite severe educational deficiencies in many cases when entering the Homes, the children have been achieving scores, on nationally recognized standardized tests, which average 1.7 grades above their grade level, and the educational program as a whole has received commendations.

(50) The children learn to live "a separated life" or a life which is in accordance with Biblical mandates and does not include involvement with worldly pursuits.

(51) The children are limited in their contacts with the outside world. This restriction is part of the treatment used by the Homes.

(52) The children learn to lead productive lives and to choose Christ as their Saviour.

(53) The children are expected to assume responsibility for the cleanliness and tidiness of their personal living space.

(54) The homes do not use drugs or tranquilizers in the care of children.

(55) Activities undertaken at the Rebekah Home include sewing, cooking, sports, choral activities and counseling.

(56) The facilities owned and operated by the Church are clean, spacious, well maintained, safe, healthful and are well designed to meet the needs of troubled young people.

(57) Complete facilities for recreational opportunities exist on the premises of the Homes.

(58) The food served is plentiful, well-balanced, and is grown on the premises without use of chemical fertilizers or pesticides.

(59) Facilities for medical care are maintained within the Homes.

(60) The dormitories are under 24-hour supervision.

(61) There is very little violence in the Homes.

(62) It has been the experience of the Homes that children who have undergone a spiritual conversion to Christianity turn away from unproductive and self-destructive attitudes and practices.

(63) Experiences at the Homes help to form the lives of those who live there. Those who graduate are able to lead useful, productive Christian lives.

(64) Approximately 90% of those who remain at the Homes from 3 to 12 months are helped dramatically.

(65) Parents of children who have resided at the Homes believe the Homes are places where children with problems can get away from pressures they experience in the public schools and receive the supervision and discipline they need.

III. *Operation of the Licensing Process and Application of State Standards:*

(66) To be licensed by the State, child care institutions must meet Minimum Standards adopted and administered by the Texas Department of Human Resources.

(67) The DHR in enforcing the Minimum Standards requires 100% compliance therewith, even where the standard is trivial, unless it grants a variance or waiver.

(68) There are approximately 240 separate Minimum Standards which must be met by each child care institution in Texas.

(69) The Human Resources Code state "all requirements" must be met before an institution can be licensed. The DHR has determined that statement to mean that an institution must do more than meet the Minimum Standards.

(70) The DHR has no standards or regulations relating solely to religious institutions, but applies its standards and regulations to all child care facilities alike.

(71) The DHR views it as its responsibility to supervise the moral and emotional development of all children residing in child care facilities.

(72) The DHR interprets the Code to permit it to inspect and evaluate every aspect of a facility.

(73) The DHR investigates and evaluates the plan of care offered by an applicant for license whether or not the applicant is a church and whether or not the plan of care is essentially religious.

(74) Application of the Minimum Standards gives DHR ultimate control of the plan of care at a child care facility, whether that facility is religious or secular.

(75) The DHR Minimum Standards states that a child care institution "shall not accept a child for care until an intake study has been made and the institution has determined the placement meets the needs and best interests of the child and his or her family." Under that standard the DHR reviews and evaluates the institution's determination, and decides whether placement in a church home, which is pervasively religious, adequately meets the needs and best interests of a particular child.

(76) The DHR requires the licensing representatives to possess the ability to assess "the appropriateness of placement of children in child care facilities according to sound child care principles".

(77) The DHR makes the ultimate determination as to whether the education which a child receives at a licensed institution is "appropriate".

(78) The DHR determines in its own judgment whether the mode of dress at a licensed institution is acceptable.

(79) The Minimum Standards provides that child care institutions shall obtain or provide professional consultation for children. If the DHR believes the method employed by a particular institution did not constitute proper professional consultation and treatment in the

Department's judgment, then the institution is in violation of the Minimum Standards.

(80) Since all children in the Church's Homes have problems of adjustment in the social environment, DHR Minimum Standards requires all of those children be given "professional consultation and treatment", which in discretion of DHR must include psychiatric treatment.

(81) DHR evaluates the adequacy of in-service training for child care personnel, whether at religious or secular institutions and whether or not the training is religious training.

(82) The DHR requires institutions have written policies stating qualifications for volunteers who assist in the work of child care facilities, including guest preachers at religious services, and evaluates those qualifications as part of the licensing process.

(83) Only persons who meet all State requirements and who pass a State-developed examination are permitted to be administrators of child care facilities.

(84) The examination, developed and administered by DHR by which is judged a person's "competence" to administer a child care facility, contains questions to which answers involving endorsement by State-chosen values in the provision of child care are required. These questions and answers evidence State judgments, affecting religious and secular administrators, as to:

(a) The "essential personal qualities of a good child care administrator";

(b) DHR's view that an "effective" administrator does not counsel children;

(c) DHR's view that "effective" administrators solicit "policy" ideas from the children;

(d) DHR's view that an "effective" administrator must involve himself in the life of the outside community;

(e) DHR's view that an "effective" administrator must make use of "outside consultation for program development and evaluation";

(f) DHR's view that an "effective" administrator does not attempt to develop an image as an "authority figure" to the children;

(g) DHR's view that "group decision" is effective and useful;

(h) "Essential attributes" of personnel involved in caring for children;

(i) DHR's view that providing "employee centered leadership opportunities" is necessary to overcome their "submissiveness";

(j) DHR's view that permitting boys and girls to live together in the same cottage is "generally healthy" and does not encourage sexual activity;

(k) DHR's view that a child care facility should engage in "social service planning";

(l) DHR's view that child care personnel should "resist being assigned the role of punishing children";

(m) The proper "philosophy" and "concept of role" of a child care administrator; and

(n) The propriety of the reasons why an administrator of a child care facility has chosen to be such.

(85) The DHR, which controls who shall or shall not be an administrator of a child care facility, does not base its judgments as to qualifications of a person to be an administrator upon any standards contained in statutes, or regulations, but rather relies upon subjective personal judgments.

(86) The evaluation of "gross negligence" in the care of children on the part of an administrator, which

justifies revocation of his license, is subject to determination by DHR based upon subjective standards developed and administered by the Department.

(87) DHR makes no exception for the records of employees performing religious duties for religious institutions in its requirement that all records of a child care facility be open to its examination.

(88) DHR does not grant variances from the requirement to keep all records open to it based on religious objection to investigation of confidential material (which may include records of communications to clergy) maintained at a religious child care facility.

(89) Minimum Standards requires that "the personal qualifications of employees shall be verified", and the records of that required verification, including references as to religious character, are open to State inspection and evaluation.

(90) Inspections of religious child care facilities by the DHR are not tailored in any way in order to accommodate the statement in the Code that the agency shall not involve itself in the form, manner, or content of religious instructions in a religious facility.

(91) It is the policy of DHR, when making inspections of child care facilities, whether the inspection is announced or unannounced, to interview children residing in the Homes.

(92) In the past, representatives of the predecessor agency to DHR have fomented unruly behavior by suggesting to children at the Homes that program of care is not in their best interest.

(93) Surveillance by DHR of the Homes operated by the Church has been continuous and extensive. Reports of these surveillances indicate that undercover investigators go so far as to pose as church members to gain access to worship services at the Homes operated by the Church. These reports detail contents of sermons and the hymns sung at the worship services.

(94) The surveillance techniques employed by DHR personnel relative to the Church's Homes have included contacting children inside the Homes and soliciting communications from them in which the children are instructed to use code words which would have a special meaning to DHR personnel.

(95) Investigative personnel of DHR, who carried out surveillance of the Church's Homes, are trained in physical surveillance methods which stress surreptitious techniques.

(96) The surveillance of the Church's Homes by DHR has included the use of binoculars, cameras, tape recorders and the soliciting of information from persons connected with the Homes.

(97) The DHR exercises ultimate control over licensed child care institutions in the areas of care provided the children; the qualifications, competence and performance of the administrators; finances; volunteer workers; and staff. In enforcing this control DHR makes unannounced inspections of facilities, and requires facilities to open all records concerning staff, children and finances to DHR. Failure to submit to inspection and evaluation, or having submitted to such, being found lacking in any regard by DHR, can result in refusal or withdrawal of permission to operate as a child care facility.

(98) The DHR has constituted a church relations advisory group to which are referred requests for variances from, or waivers of, regulations which relate to religious issues.

IV. *Objections By the Church to the Licensing Process:*

(99) The Church's objection to the application of the Human Resources Code to the program and employees at the Homes are rooted in the need to protect the religious nature of the Homes.

(100) The DHR's judgments concerning adequacy of child care are informed by current theories of child care, and its complete discretion in applying those can result in advancement of one theory of child care over another. This can bring the DHR into conflict with pervasively religious theories of child care.

(101) Institutional licensing representatives of the DHR to assess the appropriateness of child placements are trained in concepts of human development which are inimical to fundamentalist Christian belief.

(102) For Biblical reasons, fundamentalist Christians believe God is sovereign over religious functions, and the province of the State is to assure justice in the civil order. This has been so since the earliest times when Christians were martyred for proclaiming Christ sovereign rather than Caesar.

(103) The Church believes, on scriptural grounds, that ultimate authority — to determine whether or not a religious ministry shall exist — over the Church's Homes belong to the Lord Jesus Christ and not to government.

(104) In Fundamental Christianity the concept of separation of Church and State is Biblically based.

(105) The Church objects on Scriptural grounds to any State licensing that would involve inspection, regulation or evaluation of any of the religious aspects of the operation of the Homes.

(106) The Church, and those individuals responsible for administration and operation of the Homes, believe the State has the right to require license, permits or certificates of churches in the areas of physical health and safety.

(107) The facilities operated by the Church presently meet all applicable fire, safety and health regulations, and the Church does not object to inspections by fire, safety and health agencies to verify compliance with reasonable regulations.

(108) On religious grounds the Church objects to the provisions of Human Resources Code which requires

State investigation of the plan of care for children in the Homes. The care at the Homes is essentially religious and inspired by Scripture.

(109) The Minimum Standards requires outside evaluation of communications between children and their parents; the Church opposes on Scriptural grounds, such interference with the parent-child relationship.

(110) Although Texas law requires administrators of child care institutions to be licensed, such licensing is objected to by the Homes because it is necessary for those pursuing a religious vocation to do so without first securing permission from the State.

(111) Many of the questions on the DHR child care administrators licensing examination are entirely irrelevant to practices which are followed at pervasively religious child care facilities.

(112) For religious reasons the Church objects to a provision of the Human Resources Code which permits the State to assess capabilities and qualifications of employees of the Homes since the qualities needed to perform the work of the Homes are spiritual in nature.

(113) The licensing requirements would make it difficult for the Homes to employ "born again" Christians who they require as staff members.

(114) For reasons of its religion, the Church opposes State requirements which would compel the Homes to make financial disclosures to the State.

(115) The Church believes, on scriptural grounds, that the just shall live by faith and depend on God for finances. For this reason the Homes cannot formulate the type of financial plan contemplated by State requirements.

(116) The Minimum Standards requires the Church to submit a 12-month budget to the State; enforcement of this would negate the Church's Biblically grounded desire to "live by faith".

(117) The Minimum Standards states: "Children in care shall not be required to perform at public gatherings". This would prohibit children from being required to perform at religious services if any part of the public is present.

(118) The Minimum Standards provision requiring children to participate in community activities would undermine the methods of treatment used in the Homes.

(119) The Minimum Standards provision prohibiting "belittling" of the child would interfere with the religiously-based manner in which children at the Homes are taught to recognize their sinful nature.

(120) The Minimum Standards prohibiting the Homes from teaching the children to acknowledge their dependency interferes with the established practice of the Homes to teach children to depend on the Lord.

(121) The children who reside in the Homes believe the closing of the Homes would have serious adverse effect on them.

(122) The closing of the Homes would put the residents back with the troubled life style they pursued previously and would have a devastating impact on them.

(123) A child who is removed from the Church's Homes and placed in a home which used other than primarily spiritual methods would be confused by the change in value system and the course of the spiritual regeneration would be interrupted or halted.

(124) Expert testimony establishes closing of the Homes will severely harm the children who are being helped by the Homes. These children, who now live in an atmosphere where religious authority pervades, could become sufficiently confused so as to consider the State, in claiming to exercise a power superior to the Church's relating to the religious mission of the Church, to have become God.

(125) Closing of the Homes would adversely affect the staff of the Homes in that they believe they have a religious calling to serve in these functions.

(126) Closing the Homes would adversely affect the parents of the children, as many believe the last avenue of hope for their children will have been closed.

V. *Lack of Compelling State Interest in Affixing the Licensing Requirement to Church Homes:*

(127) Expert testimony establishes that when spiritual regeneration is employed to treat troubled children, it is not wise to subject children who are in a state of violence or extreme emotional upset to psychiatric or psychological counseling or treatment.

(128) Expert testimony establishes that in the case of a child who is undergoing spiritual conversion after a life of crime or maladjustment, it is not beneficial for the child to be required to participate in functions outside the institution or to form friendships with persons outside the institution.

(129) Expert testimony establishes children with personality problems could become anti-social if not reformed before reaching adulthood.

(130) The treatment of children with severe behavioral disorders is the traditional province of social work, however, the discipline of social work does not have any settled method for dealing with the problems.

(131) The discipline of social work is incapable of acknowledging sin as the cause of aberrant behavior and of recognizing a conscious turning away from sin by conversion to Christ as a remedy for that behavior.

(132) Any person who engages in the spiritual regeneration of troubled children, to be effective, must possess special personal qualities, a belief in his or her ministry, and a belief in his or her call to serve God in this manner.

(133) Traditional social work training, because it ignores the spiritual dimension of life, is not adequate preparation for a person who engages in the practice of the spiritual regeneration of children. Nor would that

training adequately prepare anyone for the task of evaluating that spiritual process.

(134) Expert testimony establishes that a degree in social work or other behavioral science is not necessary to provide good child care and, in fact, may be counterproductive of that end.

(135) Expert testimony establishes the State is not capable of engaging in inspection or evaluation of the spiritual regeneration of children.

(136) The DHR played a significant role in drafting the Child Care Licensing Act.

(137) It is not necessary for a child care institution to be State licensed in order to provide good child care.

(138) The Church's Homes are operating successfully without State supervision or control.

(139) Expert testimony establishes no system of government or regulation of child care facilities can guarantee the promotion of a child's welfare.

(140) The only requirements of a government agency with respect to provision of child care which can be demonstrated to be necessary and not harmful are those relating to health, safety and sanitation. The State should also be permitted to require persons employed in child care facilities not have been convicted of a crime involving moral turpitude.

CONCLUSIONS OF LAW

(1) The Free Exercise Clause of the First Amendment to the Constitution of the United States protects the rights of the Corpus Christi People's Baptist Church and the pastor to exercise their ministry for the regeneration of distressed children without the necessity to submit to the prior restraint of licensing as mandated by the Texas Human Resources Code.

(2) The Establishment Clause of the First Amendment to the Constitution of the United States prohibits the excessive entanglements between church and state

which would result from the application of the licensing requirements of the Texas Human Resources Code to the non-tax supported homes of the Corpus Christi People's Baptist Church.

(3) The Free Exercise Clause of the First Amendment to the U.S. Constitution protects the rights of staff members employed in the homes of the Corpus Christi People's Baptist Church to pursue and exercise a religious vocation through service at the homes.

(4) The Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protect the rights of distressed children to enjoy a Bible-centered means of regeneration at the homes operated by the Corpus Christi People's Baptist Church.

(5) The Free Exercise Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment of the U.S. Constitution protect the rights of parents of distressed children to choose the Bible-centered means of regeneration offered by the Corpus Christi People's Baptist Church for their children.

(6) The Due Process Clause of the 14th Amendment to the U.S. Constitution protects the right of the Corpus Christi People's Baptist Chruch to utilize its properties in ways which are promotive of the common good.

(7 through 10) Application by the Human Resources Code to the homes operated by the church herein would violate [Article I] Section 6, Article I Section 19; Article II Section 1; Article III Section 1; Article I Section 3(a) of the Texas Constitution.

(11) Application of the Human Resources Code to the Church, pastor, staff, children and parents of children in the homes would violate 42 USC §1983 by depriving them of the civil rights secured to them by the U.S. Constitution.

The trial court's Findings of Fact are not challenged on appeal. Therefore, they are binding on the parties and us and they become the facts of the case. Crain v. Hill Co., 613 S.W.2d 367, CCA (Waco) NRE 1981. They support the judgment.

The State appeals on 3 Points mainly contending: "(1) The trial court erred in finding that the U.S. Constitution in any manner precluded the application of the licensing requirement to defendants."

Amendment I to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, *or prohibiting free exercise thereof* * * *"

Amendment XIV provides in pertinent part: "* * * no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The XIV Amendment renders Legislatures of the States "as incompetent as Congress to enact such laws" as denied to Congress by the First Amendment. Cantwell v. Connecticut, 310 US 296, 303; 60 S.Ct. 900, 903 (1940).

The record establishes and the trial court found that the Homes here involved are operated as an integral part of the religious ministry of the Corpus Christi People's Baptist Church. Lemon v. Kurtzman, 403 US 602, 616; 91 S.Ct. 2105, 2113. Government may not infringe upon religious liberty in the name simply of the public interest; only in the extremely rare situation in which government can from a State interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause. The State must prove a compelling State interest to prevail. In the record in this case the State of Texas has proved no supreme governmental interest which would be served by applying

the Human Resources Code to the Church's homes. Indeed it has instead been shown that the intended shut down of the homes, while destroying the enjoyment of basic constitutional liberties, would do so pursuant to a regulatory mass which the Chief Administrator could not justify, or in important instances, even explain. The public interest is plainly served by leaving the Church homes alone.

The State's contention (1) supra, is overruled. Under our view of the case, Points 2 and 3 are immaterial.

AFFIRMED

FRANK G. McDONALD
Chief Justice

ORDERED NOT PUBLISHED
Rule 452, TRCP

APRIL 26, 1984
NO. 10-83-128-CV

Trial Court
297,248

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT WACO

THE STATE OF TEXAS,

Appellant

v.

CORPUS CHRISTI PEOPLE'S
BAPTIST CHURCH, INC, et al.,

Appellees

From 200th Judicial District Court
Travis County, Texas

DISSENTING OPINION

As in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), we are presented with a "square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children". I find the State's interest to be paramount and would reverse and render judgment for the State rather than affirm.

My dissent is respectfully entered with mixed emotions, as I recognize that the unlicensed homes of the People's Baptist Church, through a Bible-based program of spiritual regeneration conscientiously applied by a

Christian staff, have rescued many troubled youth who evidently failed to benefit from prior placements in licensed facilities. Success is difficult to ignore. The important questions before us, however, should not be decided by the success of the Church's child-care program.

Which of the followingclaims must be accorded supremacy under the facts of this case: Appellees' right under the Religion Clauses of the First Amendment, which specifies that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; or the State's statutory obligation under the Code[1] to license and regulate child-care facilities. Our decision must turn on the delicate balancing of these competing rights.

Although our decision will be legally binding only on the parties to this suit, its impact will transcend the narrow limits of this proceeding. We decide issues which will serve as precedents for the resolution of future disputes relating to the licensure of child-care facilities operated as an integral part of a church's ministry. For this reason alone, our decision must not be controlled by the commendable record of the People's Baptist Church in child care.

This suit is the third in a series of proceedings in State court involving whether the State can apply the licensing and regulatory provisions of the Code to the child-care facilities now operated by the People's Baptist Church. See Roloff Evangelistic Enterprises v. State, 556 S.W.2d 856 (Tex.Civ.App.—Austin 1977, writ ref'd n.r.e), appeal dism'd for want of substantial federal question, 439 U.S. 803 (1978), where the court held the child-care facilities, then operated by Roloff Evangelistic Enterprises, Inc., were subject to licensing in the face of claimed protection under the First Amendment. Also, see Oxford v. Hill, 558 S.W.2d 557 (Tex.Civ.App.—Aus-

1. References in this opinion to the Code are to the Texas Human Resources Code, Section 42.001 et seq.

tin 1977, refused), where a staff member of the homes unsuccessfully argued that licensing by the State would impinge on his rights under the Free Exercise Clause of the First Amendment.

Shortly after these two decisions upholding the State's right to license the homes, Roloff Evangelistic Enterprises, Inc., a non-profit corporation which founded and operated the homes for many years, transferred ownership and operation of the Rebekah Home for Girls, Anchor Home for Boys and Lighthouse for Boys to the Corpus Christi People's Baptist Church, Inc., a corporation chartered in 1979. Prior to its incorporation, the Corpus Christi People's Baptist Church, with Rev. Lester Roloff as pastor, had been in existence as a religious body since 1969. Rev. Roloff explained the reasons for transferring the homes to the corporate church as follows: "Instead of [the State] jumping on the [Evangelistic] Enterprises, you will be fighting with the church from here on . . . we feel like we wanted another opportunity to plead our rights as the church of the Lord Jesus Christ without having to saddle a license on the church that's owned, operated, started and will be consummated by Jesus Christ . . ." The spiritual methodology employed in the homes remained unchanged after the transfer.

The State filed this suit against Corpus Christi People's Baptist Church, Inc. and Rev. Roloff, among others, to enjoin operation of the Church's unlicensed child-care facilities. Several members of the child-care staff, as well as some children residing in the homes and their parents, were allowed to intervene as defendants.

The State alleged it has the responsibility under the Code for licensing and regulating the homes to protect the health, safety and well-being of the children residing there. The Church admits it has not applied for or been granted a license and does not intend to have its homes licensed. Defendants claim that, as applied to them, the

Code is unconstitutional under the First, Ninth and Fourteenth Amendments to the U.S. Constitution as well as under several articles of the Texas Constitution.

Following a non-jury hearing, the trial court filed extensive findings of fact and conclusions of law, denied all the relief which the State sought, and entered a take-nothing judgment in defendant's favor. The court concluded that: (1) the Free Exercise Clause of the First Amendment protects the rights of the Church and its pastor to operate the homes without prior restraint of State licensing; (2) the Establishment Clause of the First Amendment prohibits excessive entanglements between church and state which would result from the State licensing the Church's homes; (3) the Free Exercise Clause protects the rights of the homes' staff members to pursue and exercise a religious vocation; (4) the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment protect the rights of distressed children to enjoy a Bible-centered means of regeneration of their lives by residing in the homes; and (5) the Free Exercise Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment protect the rights of parents of distressed children to choose the Bible-centered means of regeneration offered by the homes. The court also concluded that application of the Code to the Church's homes would violate Articles I, II, III and VI of the Texas Constitution, as well as 42 U.S.C. §1983. The State's motion for a new trial was denied.

The State's first point of error contends the court erred in holding that the U.S. Constitution precluded licensing of the Church's child-care facilities in any manner. Based on the record before us, this point should be sustained.

The evidence supports the lower court's holdings that operation of the child-care facilities is an integral part of the religious ministry of the People's Baptist Church and that the homes would not exist except for

such ministry. The record shows the Church's ministry and its child-care facilities are so intertwined and inseparable as to constitute one indivisible, religious practice. The child-care methodology applied in the Church's homes is so pervasively religious and all-encompassing in its attack on sin as the cause of a child's aberrant behavior that it may be fairly described as "Christian to the core". A witness described the Church's Fundamentalist Christian child-care ministry, carried out by a "born again" staff twenty-four hours a day, seven days a week, as being based upon ancient scriptural commandments to care for problem and needy children. Such ministry has been "so understood from the very beginning" of Christianity. One can scarcely envision a method of child-care more pervasively religious than the one described in the record before us. Furthermore, the evidence supports a finding that the child-care staff, who are primarily selected for their scriptural beliefs and as religious role models, are exercising a religious calling to work in the Church's child-care ministry.

However, conceding that operation of the homes is an integral part of the Church's ministry and that the child-care staff are exercising their religious vocations by working with troubled children does not decide the questions before us. Although the Church's ministry and the staff's religious vocations fall within the protection afforded by the First Amendment, their claims of religious liberty must nevertheless be balanced against the right of the State to license and regulate child-care facilities in order to assure the health, safety and well-being of children. This court "must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable . . . requirements." Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 1543, 32 L.Ed.2d 15 (1972).

The right and obligation of the State, as *parens patriae*, to guard the general interests and well-being of

children is well-recognized. Prince v. Massachusetts, *supra*. Indeed, the welfare of children has always been of deep concern to the State of Texas. Jones v. Alexander, 122 Tex. 328, 59 S.W.2d 1080 (1933). The Code is a legislative declaration of the State's legitimate concern for the welfare of children residing in child-care facilities. Sec. 42.001 states the Code's purpose:

> The purpose . . . is to protect the health, safety, and well-being of the children of this state who reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program. It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs.

The responsibility for nurturing a child first resides with the parents, but where the child resides in the care of others, the state has a legitimate and compelling interest to regulate the environment under which the child's care is to be accomplished. As sovereign parent, the state is obligated to exercise its authority to guarantee the child a secure, fulfilling and wholesome environment for daily living as well as protection from abuse, exploitation and injury. No higher duty rests upon a state than guaranteeing each child under its care, regardless of social or economic background, the opportunity to realize the full measure of human potential.

The State's right and responsibility as *parens patriae* does not guarantee it automatic supremacy over claims asserted under the Religion Clauses of the First Amendment, as the State's interest must be weighed against the religious claims asserted. When balancing these competing rights, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims" under the First Amendment. Wisconsin v. Yoder, *supra*.

The trial court apparently based its judgment on the State's failure to prove a compelling interest which required licensing of the Church's child-care facilities. Specific findings by the lower court that institutions can provide good child care without being licensed by the State and that the Church's homes are operating successfully without State supervision or control, although undoubtedly true, are not controlling.

As a matter of law, the undisputed facts in this case not only establish the State's obligation to license and regulate the Church's child-care facilities cannot be "otherwise served" through less intrusive means. The Church admits that it operates unlicensed child-care facilities. Children are living in the homes away from the direct supervision of their parents. They are placed there for treatment of serious personal problems either through voluntary admission by their parents or by involuntary judicial commitment. The homes have total and complete control over their health, safety and well-being. The children are immersed in a treatment program so comprehensive that it controls the smallest details of their daily lives. While none of the witnesses testified that the State's interest is compelling and of the highest order, such specific testimony would have been superfluous. The State's interest is compelling and entitled to predominance not by virtue of someone saying that it is or as a result of the Legislature adopting the Code but because the facts in this case speak louder than words.

Defendants concede the State's compelling interest to license and regulate secular facilities but deny the State's interest is entitled to the same weight when the homes for licensing and regulation are the facilities operated as an integral part of the Church's ministry. As a justification for avoiding licensing and regulation, defendants point with justifiable pride to the homes' physical facilities, to a child-care staff of dedicated people of the highest moral character, and most of all, to the chil-

dren whose lives have been salvaged through application of a spiritual method of child care. However, the State's interest obligates it to license and regulate the strongest as well as the weakest facility in child care. An institution's record of success in child care cannot and should not determine whether it can be licensed and regulated by the State. If the State's authority cannot reach the Church's homes in face of the defendants' claim of religious liberty, the State will be impotent to license and regulate any homes operated as an integral part of the ministries of other religious bodies where children may be subjected to abuse or exploitation in the name of theology.

Defendants contend that licensing and regulation will violate the Church's ministry, the rights of staff members to practice their religious vocations, the rights of children to receive spiritual regeneration of their lives, and the rights of parents to have their children receive spiritual regeneration in a pervasively religious atmosphere. Licensing and regulation by the State does present a substantial danger that defendants' religious beliefs and practices, as they relate to the homes, will be placed in conflict with a secular methodology that relegates the spiritual dimension of child care to a lower if not non-existent priority. Even though the Church's religious beliefs and practices as they relate to child care may be burdened, modified or even displaced by secular regulation, the potential of such an intrusion does not mean that an exemption accommodating defendants' claim of religious liberty must be granted. A state may justify an inroad on religious liberty by showing that the governmental intrusion is the least restrictive means of achieving some compelling state interest. Thomas v. Review Bd. of Indiana Employment Sec., 450 U.S. 707, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).

The record before us conclusively shows that the power to license and regulate child-care facilities rests with the State and that no other entity can discharge its

solemn responsibilities as *parens patriae*. The Church vows it will not bow to the regulation of its homes by any other secular or religious entity. Enforcement of the State's compelling interest cannot be less intrusive than what is asserted. Either the State's authority to license exists, or it does not exist. The State's power to license and regulate child-care facilities simply cannot be recognized in a piecemeal fashion or be accorded partial supremacy. The State's compelling interest in licensing and regulating child-care facilities cannot be "otherwise served" through existing statutes covering child abuse, fraud, safety and health as urged by defendants. The compelling interest of the State can only be served through the full application of the Code's licensing and regulatory provisions.

In addition to claiming protection under the Free Exercise Clause of the First Amendment, defendants also assert their rights are protected under the Establishment Clause of the First Amendment. They allege that licensing and regulation will create "excessive entanglements" between church and state. The decisions interpreting the Establishment Clause do warn of the danger of excessive entanglements between Church and state. Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity". Walz v. Tax Commission of City of New York, *supra*. For governmental action to avoid violating the Establishment Clause, the statute on which the action is based must pass muster on three grounds: (1) the statute must have a secular legislative purpose; (2) the statute's principal or primary effect must be one that neither advances or inhibits religion; and (3) the statute must not foster excessive government entanglement with religion. Lemon v. Kurtzman, *supra*.

Defendants contend the State's child-care regulations, which require a continuing and intimate evaluation by the State of finances, staff qualifications, and treatment programs used in child-care facilities, "bristle" with forbidden and excessive entanglements. Defendants present no relevant case authority to support their argument that the Establishment Clause precludes licensing and regulation of the Church's homes, and I have found none. "Excessive entanglement" questions have generally arisen in situations where a state attempts to provide financial aid to a religious institution. All entanglements between church and state are not prohibited by the Establishment Clause but only those which are excessive in degree. Walz v. Tax Commission of City of New York, *supra*. If entanglements between church and state must result from a state's compelling interest being served, as here, the state's intrusion upon religious liberty, accompanied only by the entanglements necessary to serve the compelling interest, cannot be considered excessive. Therefore, this court should hold as a matter of law that the entanglements created by the Church's homes being licensed and regulated by the State are not excessive.

Defendants foresee excessive entanglements arising from the State's regulatory scheme, entanglements that strike at the "heart of the Church's mission". They point to various provisions in the minimum child-care standards which will entangle the State on a continuing basis with the Church's child-care ministry if the State is allowed to license the homes. The Church has no license, has sought none, and admits that it does not intend to license its facilities or abide by any of the State's standards. Any question relating to the reasonableness of individual regulations, as balanced against defendants' religious objections, should not be reached or determined in this proceeding. State, Etc. v. Heart Ministries, Inc., 227 Kan. 244, 607 P.2d 1102 (1980), appeal dism'd for want of substantial federal question, 449 U.S. 802

(1980). Any findings or conclusions by the trial court to the contrary are erroneous.

Even if defendants' objections to individual child-care regulations are properly before us, the minimum standards as a whole are not, as they are alleged to be, impermissibly vague. While the standards do provide for discretion by the regulatory staff of the Department of Human Resources, to require absolute precision in every provision would be requiring the impossible. The argument that the Legislature has unconstitutionally delegated legislative authority to the Executive Branch by authorizing the Department of Human Resources to adopt minimum child-care standards has already been rejected in Oxford v. Hill, *supra*.

This Court should hold, based on the record before us, that the Religion Clauses of the First Amendment and the Fourteenth Amendment do not preclude the State from licensing and regulating the Church's child-care facilities. State, Etc. v. Heart Ministries, Inc., *supra;* Roloff Evangelistic Enterprises v. State, *supra;* and Oxford v. Hill; *supra*.

Defendants also argue that their religious rights are protected under the Ninth Amendment, but they cite no authority to support such an argument. If defendants' religious rights are not to be accorded preeminence under the First and Fourteenth Amendments, reason would dictate that a claim of protection under the Ninth Amendment will not guarantee their supremacy.

Furthermore, I do not find any support in the evidence for the trial court's conclusions that the State is precluded from licensing or regulating the Church's homes by provisions of the Texas Constitution or 42 U.S.C. §1983. The court's holdings in this regard are clearly erroneous, and the State's second point should be sustained. We need not reach the State's third point.

The religious claims of the staff, parents and children are entitled to no more weight than those asserted by the Church. Intervenors' claims are inextricably

bound with those of the Church, and if the Church's constitutional rights must give way in face of the State's compelling interest, then so must the religious claims of the staff, parents and children.

For the above reason, I would reverse and render judgment for the State.

BOB L. THOMAS
Associate Justice

ORDERED NOT PUBLISHED
Rule 452, T.R.C.P.

APPENDIX C

County of
Travis
STATE OF TEXAS
April 17, 1981

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Coover and Coover
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Corpus Christi, TX 78411

Re: The State of Texas, Plaintiff, vs. Corpus Christi People's Baptist Church, Inc., Wiley Cameron, Robert Galloway, Frances Galloway, Fay Cameron, Lester Roloff and The People's Church, Defendants; Cause No. 297, 248, In the 200th Judicial District Court, Travis County, Texas

To All Parties Of Record:

On October 11, 1979, the State of Texas on behalf of the Texas Department of Human Resources, a State Agency, filed its petition seeking a temporary and permanent injunction against the Corpus Christi People's Baptist Church individually, and against Lester Roloff, its pastor, as well as against the directors, officers, and

agents of the church. Also named as defendants were Roloff Evangelistic Enterprises, Inc., and its officers, directors, and agents. The State alleged that all of these defendants had and were operating child care facilities without having a license from the Department of Human Resources in contravention of the Texas Human Resources Code. In addition to the injunctive relief sought, the State sought assessment of civil penalties of $50.00 per day to $1,000.00 per day for each day of operation for (1) each day of operation by defendants of each child care facility (2) each violation of the Code which has threatened children in the facilities with serious harm and (3) for each day defendants place public advertisements for the facilities.

The defendants filed an Original Answer on November 11, 1979, denying the State's allegations and alleged, among other things, affirmative Constitution defenses as follows: (1) Violative of the rights of the church and its pastor as protected by the Free Exercise Clause of the First Amendment to the Constitution of the United States; (2) Violative, through the creating of excessive entanglements between Church and State of the Establishment Clause of the First Amendment to the Constitution of the United States; (3) Violative of rights protected by the Free Exercise Clause of the First Amendment of staff members of the church's homes to pursue a religious vocation; (4) Violative of rights of distressed children protected by the Free Exercise Clause of the First Amendment and by the Due Process Clause of the Fourteenth Amendment, to enjoy a Bible centered means of regeneration; (5) Violative of the rights of parents of those children, protected by the Free Exercise and Due Process Clause, as well as the Ninth Amendment, to choose such a means for the regeneration of their children; (6) Violative of the rights of the church, protected by the Due Process Clause to utilize its own properties in ways not inimical to, but promotive of, the common good; (7) Violative of Article VI of the Consti-

tution of Texas by controlling and interfering with the rights of the church and its pastor and staff in matters of religion; (8) Violative of Article I, Sec. 19 of the Constitution of Texas by depriving defendants of liberty and property without due process of law; (9) Violative of Article II, Sec. 1 and Article III of the Constitution of Texas on account of exercise of legislative power by the Executive Branch of government; (10) Violative of Article I, Sec. 3a of the Constitution of Texas by denying defendants equality under the law; (11) Violative of Section 1983 of Title 42, U.S.C., by subjecting defendants to deprivation of civil rights secured by the Constitution of the United States; and (12) Necessitated, due to the prohibitions against governmental regulation contained in Sections 42.001 and 42.042(K) of the Texas Human Resources Code.

On March 18, 1980, the State filed its First Amended Original Petition by which it reduced the requested civil penalties to a range of $50.00 to $100.00 per day. On this same date the State filed a second suit (Cause No. 267, 059) seeking injunctive relief against Lester Roloff and Marie Roloff on the ground of their operating Park Avenue Christian School at Corpus Christi, Texas, without a license from the Department of Human Resources. Civil penalties were also requested of from $50.00 to $1000.00 per day. The State moved for a consolidation of the two suits, and I (the Court) ordered a consolidation.

On August 14, 1980, the State moved for, and was granted, a non-suit as against Park Avenue Christian School.

On August 18, 1980, a Plea in Intervention was filed on behalf of Mr. and Mrs. Alexander Forhetz and Mr. and Mrs. Michael Gross (as parent intervenors), Diane Forhetz and Gaye Gross (as child intervenors). Those individuals alleged that the application of the Texas Human Resources Code to interests held by them in this case violated rights possessed by them under the First, Ninth and Fourteenth Amendments to the Constitution

of the United States, as well as Article 1, Sections 3(a), 6 and 9, and Article 2, Section 1, of the Texas Constitution, and Sections 1983 and 1985 of Title 42 of the United States Code. The intervention was allowed and intervenors were made defendant intervenors.

On November 17, 18 and 19, 1980, a trial on the merits was had. Upon the trial, the State requested a partial non-suit as to Roloff Evangelistic Enterprises, Inc., its officers, directors and agents as parties defendant. The partial non-suit was granted, and the style of the case was changed to *The State of Texas, Plaintiff, vs. Corpus Christi People's Baptist Church, Defendants*, Cause No. 297, 248, 200th Judicial District Court, Travis County, Texas.

After the completion of the trial on the merits, the Statement of Facts was prepared and briefs were prepared and filed with the Court. The Court studied the briefs of the parties, and thereafter the Court heard full oral argument on April 8, 1981.

This litigation in one form or another, but not necessarily the same issues, has extended over a period of almost eight years. It has been expensive to all parties and time consuming. As I stated in open court during the time of oral argument, this is *entirely a different case* from the one I decided in *Roloff Evangelistic Enterprises, Inc. vs. State*, 556 SW2d 856 (Tex. Civ. App. 1977, error ref. n.r.e., appeal dism'd, 99 S.Ct. 58, 601 (1978). Issues raised in this case were never raised in the former case and were in no way decided by either this Court or the Appellate Courts. In the former case the properties were not those of the church. All operations were owned and operated by a separate entity other than the church. Thus, here we have new parties — especially the church as a primary party — and most important, new issues. I do not consider the former decision in *Roloff Evangelistic Enterprises*, supra, in anywise controlling the present litigation.

In the State's brief much reliance is placed on the decision of the Kansas Supreme Court in *Kansas vs. Heart Ministries, Inc.*, 607 P(2d) 1102 (Kansas Sup. Ct. 1980). In my opinion this case is not controlling here. In the first place, no church was a party; secondly, the Establishment Clause of the Constitution was never raised or passed on by the Court; and thirdly, the record in that case as to parties is in no way comparable to those before the Court in this case.

The defendants have made it clear, both on brief and in oral argument, that they are not attacking the constitutionality of the Code governing the Department of Human Resources. Defendant's attack is solely on the issue of the constitutionality of the Code as applied to the facilities and operation of the Corpus Christi People's Baptist Church. A decision by this Court in favor of the defendants will in no way prejudice the State's powers with respect to other institutions. The State's power with respect to other institutions will be on another day and in another case, but not in this one.

As all the parties (the attorneys) in this case know, there is no way that a trial court has the time or the personnel to write a written legal opinion in cases like this. I have studied the briefs in detail; I have reviewed the evidence; and I have had the benefit of almost two hours of oral argument. From all of this I must make my decision.

Based upon the pleadings, the evidence, oral argument, and the law as this Court understands the Constitution of the United States and the Constitution of the State of Texas and the decided decisions thereunder, the Court concludes that it must deny all the relief sought by the State of Texas in this cause.

The attorneys for the defendants will please prepare a judgment in keeping with the Court's decision, and after the original has been approved by all parties as to *form* it is to be submitted to the Court for entry of record and filing. The form of judgment shall be in accordance

with Rule 301, T. R. C.P. It is not proper to include findings of fact in the judgment. This must be done separately upon request under Rules 296, 297, and 298 of the Texas Rules of Civil Procedure. I invite the parties to submit requests for "Conclusions of Fact and Law."

I wish to commend all the attorneys for the excellent briefs and oral arguments presented to the Court. I also wish to commend the excellent conduct of the parties which was exhibited throughout this trial and during oral argument.

Very truly yours,

CHARLES D. MATHEWS
Judge, 200th District Court
Travis County, Texas

CDM/bjv

County of
Travis
STATE OF TEXAS
AUSTIN, TEXAS
June 30, 1981

RE: No. 297, 248; The State of Texas vs. Corpus Christi People's Baptist Church, et al., 200th District Court of Travis County Texas.

To Attorneys of Record:

Under date of June 25, 1981, I signed the Findings of Fact and Conclusions of Law in the above captioned cause. They were filed in the office of the District Clerk at 10:54 a.m., June 30, 1981.

I have also this date entered an order, signed and filed as of 10:54 a.m., June 30, 1981, overruling the State's Motion for a New Trial. I saw no reason to have a hearing on this motion because everything has been argued and said that could be argued or said at least two or three times.

You may obtain copies of the above from the office of the District Clerk.

Very truly yours,

CHARLES D. MATHEWS
Judge, 200th District Court
Travis County, Texas

CDM/bb

cc: Mr. Richard Arnett
Ms. Ann Coover
Mr. William B. Ball

No. 297,248

THE STATE OF TEXAS	:	In The District Court
	:	
vs.	:	200th Judicial District
	:	
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. et al.	:	Travis County, Texas June 25, 1981

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a trial which was held on the 17th day of November, 1980, and after hearing the evidence and arguments of counsel, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. MISSION AND OPERATION OF THE CHURCH'S HOMES

1. The operation of shelters for the needy, and homes for the rescue of children is enjoined upon the Corpus Christi People's Baptist Church by its organizational documents (Defendants' Exhibit #1).

2. The Corpus Christi People's Baptist Church, Inc. (hereinafter referred to as "the Church"), which adheres to the tenets of fundamentalist Christianity, owns and operates the Rebekah Home for Girls, Corpus Christi, Texas; Lighthouse for Boys, Corpus Christi, Texas; and Anchor Home for Boys, Zapata, Texas, (hereinafter "the Homes") (p. 28, p. 110).*

3. The Homes are operated as an integral part of the religious ministry of the Church and would not otherwise exist (p. 85; p. 111-113; p. 120-121; p. 158).

* Page references within parentheses are to the Statement of Facts developed during proceedings before Judge Charles D. Mathews, November 17-19, 1981, unless otherwise noted.

4. The Church maintains the Homes in fulfillment of its religious duty to engage in works of mercy, salvation and eradication of sin (p. 147).

5. The mission of the Church's Homes is to produce a conscious turning away from sin the children who reside there (p. 155-156).

6. The Church and the Homes do not and, for Biblical reasons, refuse to accept any kind or amount of local, state or federal funds (p. 121).

7. The children at the Homes are placed there by their parents; the Church's Homes carry out a Scriptural responsibility to these parents for the care and Christian nurture of the children (p. 178).

8. Parents of children who reside at the Church's Homes often have turned to the Homes in desperation over the failure of public institutions to aid their children (p. 72-74; 77, 78).

9. In the operation of its Homes for the rescue of children, the Church is religiously commanded to employ only those methods which are based upon and are consistent with the following beliefs:

a. The King James Bible is the inspired, only infallible and authoritative Word of God.

b. There is one God manifested in the three personalities of Father, Son and Holy Spirit.

c. Satan is a real personality and he presently controls unregenerate man.

d. Jesus Christ is God, who was born of the Virgin Mary and to the human family, lived a sinless life, performed wondrous miracles, died a vicarious death as an atonement for the sins of the world; and who was resurrected bodily and did ascend bodily to the right hand of the Father; and who will return one day to this earth personally, literally, bodily.

e. Having fallen from his blessed state with God, man is morally, and spiritually depraved, a sinner by birth and a sinner by choice.

f. Sinning man must be cleansed from his sin by the blood of Christ, changed from his evil nature by the Spirit of God, and indwelt by God himself in order to be a Christian.

g. Believers will be resurrected into everlasting life and blessing in heaven.

h. Unbelievers will be resurrected into everlasting punishment and torment in hell.

i. The only permanent solution for crime, drug abuse and general rebellion against society is a transformed life made possible through personal faith and trust in Jesus Christ (Defendants' Exhibit #1).

10. Fundamentalist Christianity began in the 1890's as an effort to counter modernist tendencies in the major protestant communions, namely the questioning by those communions of scriptural commands and of the deity of Christ (p. 316-317).

11. Homes for the care of troubled children are a vital aspect of the fundamentalist Christian faith community, and are an expression of religious concern which dates back to the early centuries of the Church (p. 317-318; p. 322-324).

12. The practice of saving and nurturing lost children which has been undertaken at the Church's Homes is one which is historically traceable to the early days of the Christian church and is an expression or manifestation of the Christian religion (p. 324).

13. In early Christian times, Christians would rescue and nurture children of failed abortions and other abandoned children, and these practices were consid-

ered a reproach to the practices of the Roman civil government (p. 323).

14. The Christian Church's effort to educate young children in a religious school is essentially the same effort as regenerating troubled youth, inasmuch as both seek to bring about the conversion to Christian beliefs, that is being "born again" (p. 325-326).

15. The Corpus Christi People's Baptist Church, Inc., was founded in 1969 (p. 109).

16. Complete ownership and operation of the Homes was transferred to the Church in 1979 by Roloff Evangelistic Enterprises (p. 110; Defendants' Exhibits 2, 3, 4).

17. Roloff Evangelistic Enterprises gave up operation of the Homes in 1979 in order to make it clear that the Homes were the ministry of the Church of Christ (p. 143-145).

18. Roloff Evangelistic Enterprises is not governed by any particular church, nor is it part of or affiliated in any way with the Corpus Christi People's Baptist Church. Upon dissolution of Roloff Evangelistic Enterprises, a charitable corporation, its assets are to go to churches in Garland, Texas and Houston, Texas (p. 140).

19. Corpus Christi People's Baptist Church is not the alter ego of Roloff Evangelistic Enterprises (p. 140).

20. Reverend Lester Roloff is an ordained minister of the Gospel. He serves as pastor of the Corpus Christi People's Baptist Church and as a trustee of the Church (p. 113).

21. The Pastor of the Corpus Christi People's Baptist Church serves at the pleasure of the members of that Church, and can be removed by majority vote of the membership (Defendants' Exhibit #1).

22. Reverend Wiley Cameron is president of the Board of Trustees of the Church (p. 108).

23. Reverend Wiley Cameron and his wife, Fay Cameron, are the superintendents of the Rebekah Home (p. 85).

24. Mr. Stan Williams is employed by the Corpus Christi People's Baptist Church, Inc. as the superintendent of the Lighthouse Home for Boys (p. 96).

25. Administrators of the Church's Homes provide Christian counsel to the residents, as part of their own vocational calling, and in furtherance of the religious mission of the Homes (p. 81).

II. THE CARE PROVIDED TO THE CHILDREN AT THE CHURCH'S HOMES.

26. Every aspect of the Homes operated by the Church is based upon Biblical principle and is designed to inculcate, strengthen and enforce religious instruction and religious formation in the residents and staff of the Homes (p. 155-157).

27. The Church bases its treatment of the children on its recognition that their problems, whether with dope addiction, alcohol or rebellious behavior, are only symptoms of spiritual disorder (p. 157).

28. In keeping with the beliefs of fundamentalist Christianity, the Church's Homes view the source of the problems of distressed children as rooted in the sinful nature of man. This contrasts with the medical model of dealing with delinquent children whereby the problems of the children are seen not as sin but as a lack or an imbalance, for example, in education or environment, and the thrust of treatment is to remedy that lack. The difference between the two approaches is religious (p. 324-325).

29. The foundation of the successful treatment of the children who reside at the Homes is the establishment of their recognition of their spiritual relationship to their creator and with all others who are children of the creator (p. 53-54).

30. Christianity provides a value system and a framework of values necessary to the treatment of children who reside at the Church's Homes (p. 302).

31. Expert testimony establishes that effecting a conscious turning away from sin has been proven to be an effective method in overcoming the problems in which aberrant behavior is rooted (p. 303).

32. The children who are brought to the Church's Homes, most of them against their will, are "terminal", and are suffering from the most severe problems imaginable (p. 155).

33. Children who come to the Homes have various types of behavior disorders, problems with alcohol abuse, problems with drug abuse, sex problems, exhibit antisocial behavior, are run-aways, and have academic problems (p. 298).

34. When children come to the Homes, they are often rebellious and opposed to any form of authority (p. 56).

35. Expert testimony establishes that it is essential that children who are severely distressed be treated in a situation where discipline and authority are important components of the community (p. 307).

36. There is a distinctively Christian approach to the discipline of unruly adolescents. Such an approach is characterized by love, respect for the dignity of the person of the child, by a sense of community, by the opportunity for fellowship, sharing and service, by the use of prayer, and the belief in the power of prayer (p. 303-304).

37. The Christian approach to treatment of disturbed children is practiced at the Church's Homes (p. 304).

38. Corporal restraint is occasionally, but rarely, used at the Homes when a child comes into the Homes in a state of violence, or with self-destructure impulses (p. 114).

39. Mild corporal punishment is used at the Homes as part of the Biblically-based teaching and function of

the Homes, but only as a last resort when non-corporal means have failed (p. 115-116).

40. Residence in a "therapeutic community" is best for treatment of adolescents with problems, and involves full-time residence in a long-term closed community with emphasis on the changing of behavior, where all rules, personnel and programs are geared to the treatment of the child for 24 hours per day. Such treatment, which is practiced at the Church's Homes, addresses the intellectual, the social, the spiritual, the emotional, and the physical as part of a unified whole (p. 300-301).

41. Spiritual treatment bears a great deal of importance to the mental health of disturbed adolescents (p. 301).

42. In the spiritual regeneration of children, it is vital to have persons who act as religious role models, such as staff and teachers (p. 304-305).

43. The staff at the Homes is chosen on the basis of Scriptural beliefs. Only Christians who can claim to have been "born again" are employed by the Homes (p. 120).

44. The program for treatment of children at the Homes is rooted entirely in the commands of the Bible (p. 155-156).

45. Children at the Homes are exposed to a religious way of life which is based upon love and caring (p. 53-54).

46. As part of the program of spiritual regeneration, children at the Homes go to school during the day, attend church three times a week, and have Bible study and Bible memorization during the remainder of the week (p. 52; p. 60).

47. The children who reside at the Homes receive Christian education on the premises by means of the Accelerated Christian Education program (Defendants' Exhibits 14, 15, 16; p. 118).

48. The Accelerated Christian Education curriculum is an individualized instructional program in which the children are tested in order to discover their own

learning level, and are permitted to work at their own pace (p. 118-119).

49. Despite having severe educational deficiencies in many cases when entering the Homes, the children have been achieving scores, on nationally recognized standardized tests, which average 1.7 grades above their own grade level and the educational program, as a whole, has been the recipient of commendations (p. 118-120).

50. The children at the Homes learn to live "a separated life," or a life which is in accordance with Biblical mandates and does not include involvement with worldly pursuits (p. 98).

51. The children at the Homes are limited in their contacts with the outside world. This restriction is part of the treatment used by the Homes (p. 157-158).

52. Children who live at the Homes learn to lead productive lives and to choose Christ as their savior (p. 99).

53. The children who reside in the Church's Homes are expected to assume responsibility for the cleanliness and tidiness of their personal living space (p. 117-118).

54. The Homes do not use drugs or tranquilizers in their care of children (p. 158).

55. Activities undertaken at the Rebekah Home include sewing, cooking, sports, choral activities and counseling (p. 53; p. 59).

56. The facilities owned and operated by the Church are clean, spacious, well maintained, safe, healthful and are well designed to meet the needs of troubled young people (Defendants' Exhibits 7 through 23; p. 117).

57. Complete facilities for recreational opportunities exist on the premises of the Homes (Defendants' Exhibits 7 through 23).

58. The food which is served to the residents of the facilities owned and operated by the Church is plentiful, well-balanced, and is grown on the premises without the

use of any chemical fertilizers or pesticides (Defendants' Exhibits 7 through 23; p. 148-149; p. 153).

59. Facilities for the medical care of the children are maintained within the Homes (p. 155).

60. The dormitories at the Homes are under 24-hour supervision (p. 154).

61. There is very little violence in the Homes (p. 158).

62. It has been the experience of the Church's Homes that children who have undergone a spiritual conversion to Christianity turn away from unproductive and self-destructive attitudes and practices (p. 98-99).

63. Experiences at the Homes help to form the lives of those who live there. Men and women who graduate from the Homes are able to lead useful, productive Christian lives (p. 67-68).

64. The Homes are not totally successful in helping every child placed in the Homes, but approximately 90% of those who remain at the Homes from 3 to 12 months are helped dramatically (p. 159-160).

65. Parents whose children have resided at the Homes believe that the Homes are places where children with problems can get away from the pressures they experience in the public schools and receive the supervision and discipline which they need (p. 77-78).

III. OPERATION OF THE LICENSING PROCESS AND APPLICATION OF STATE STANDARDS

66. In order to be licensed in the State of Texas, child care institutions must meet minimum standards adopted and administered by the Texas Department of Human Resources (p. 199-201).

67. The Department, in enforcing the minimum standards, requires 100% compliance therewith, even where the standard is trivial, unless it grants a variance or waiver to a facility (p. 380).

68. There are approximately 240 separate minimum standards which must be met by each child care insti-

tution in the State of Texas (p. 197; Defendants' Exhibit #24).

69. The Human Resources Code (Section 42.049) states that "all requirements" must be met before an institution can be licensed. The Department of Human Resources has determined that statement to mean that an institution must do more than simply meet the minimum standards (p. 201; p. 240; 245).

70. The Department of Human Resources has not developed any standards or regulations which relate solely to religious institutions, but rather applies its standards and regulations to all child care facilities alike, whether those facilities are religious or secular (p. 380; Deposition of Clifton Martin, pages 37-38).

71. The Department of Human Resources views it as its responsibility to supervise the moral and emotional development of all children residing in child care facilities (Deposition of Jerome Chapman, pages 29-30).

72. The Department of Human Resources interprets Section 42.004(a) of the Human Resources Code to permit the Department to inspect and evaluate every aspect of a facility (p. 236-237).

73. The Department of Human Resources investigates and evaluates the plan of care offered by an applicant for a license, whether or not the applicant is a church and whether or not the plan of care is essentially religious (p. 238).

74. Application of the minimum standards gives DHR ultimate control of the plan of care at a child care facility, whether that facility be religious or secular (p. 453).

75. Section 3200.1 of the DHR Minimum Standards states that a child care institution "shall not accept a child for care until an intake study has been made and the institution has determined that the placement meets the needs and best interests of the child and his or her family." Under that Standard the Department reviews and evaluates the institution's determination, and de-

cides whether or not placement in a church home, which is pervasively religious, adequately meets the needs and best interests of a particular child (p. 273-274).

76. The Department of Human Resources requires its institutional licensing representatives to possess the ability to assess "the appropriateness of placement of children in child care facilities according to sound child care principles." (Defendants' Exhibit #30).

77. The Department of Human Resources makes the ultimate determination as to whether the education which a child receives at a licensed institution is "appropriate" (p. 280-281).

78. The Department of Human Resources determines, in its own judgment, whether the mode of dress at a licensed institution is acceptable (p. 279-280).

79. The Minimum Standards (Section 4100.3) provide that child care institutions shall obtain or provide professional consultation for children. If the Department believes that the method employed by a particular institution did not constitute proper professional consultation and treatment, in the Department's judgment, then the institution in question is in violation of the minimum standard (p. 278).

80. Since all of the children at the Church's Homes suffer problems of adjustment in the social environment, Section 4100.3 of the DHR Minimum Standards requires that all of those children be given "professional consultation and treatment," which, in the discretion of DHR, must include psychiatric treatment (p. 276-278).

81. DHR evaluates the adequacy of in-service training for child care personnel, whether those personnel are at religious institutions or secular institutions and whether or not the training is religious training (p. 268-269).

82. The Department of Human Resources requires institutions to have written policies stating the qualifications for volunteers who assist in the work of child care facilities, including guest preachers at religious services,

and evaluates those qualifications as part of the licensing process (p. 262).

83 Only those persons who meet all state requirements, and who demonstrate their competence by passing a state-developed examination are permitted to be administrators of child care facilities (p. 246-248).

84. The examination, developed and administered by DHR, and by which is judged a person's "competence" to administer a child care facility, contains numerous questions to which answers involving endorsement of state-chosen values in the provision of child care are required. These questions and answers evidence state judgments, affecting religious as well as secular administrators, as to, *inter alia:* a) the "essential personal qualities of a good child care administrator;" b) DHR's view that an "effective" administrator does not counsel children; c) DHR's view that "effective" administrators solicit "policy" ideas from the children; d) DHR's view that an "effective" administrator must involve himself in the life of the outside community; e) DHR's view that an "effective" administrator must make use of "outside consultation for program development and evaluation"; f) DHR's view that an "effective" administrator does not attempt to develop an image as an "authority figure" to the children; g) DHR's view that "group decision" is effective and useful; h) "essential attributes" of personnel involved in caring for children; i) DHR's view that providing "employee centered leadership opportunities" is necessary to overcome their "submissiveness" j) DHR's view that permitting boys and girls to live together in the same cottage is "generally healthy" and does not encourage sexual activity; k) DHR's view that a child care facility should engage in "social service planning"; l) DHR's view that child care personnel should "resist being assigned the role of punishing children"; m) the proper "philosophy" and "concept of role" of a child care administrator; and n) the propriety of the reasons why an administrator of a child care facility has chosen to be

such (Defendants' Exhibit #31, Questions I-15, I-22, I-23, I-25, I-29, I-30, I-33, I-34, I-42, IV-4, IV-31, IV-37, VI-21 and VI-24).

85. The Department of Human Resources, which exercises control over who shall or shall not be an administrator of a child care facility, does not base its judgment as to the qualifications of a person to be an administrator upon any standards contained in statutes or regulations, but rather relies upon subjective personal judgments (p. 247-248).

86. The evaluation of "gross negligence" in the care of children on the part of an administrator, which justifies revocation of his license, is subject to determination by the Department based upon subjective standards developed and administered by the Department (p. 248-251).

87. DHR makes no exception for the records of employees performing religious duties for religious institutions in its requirement that all records of a child care facility be open to its examination (p. 267).

88. The Department of Human Resources does not grant variances from the requirement to keep all records open to it based upon religious objection to investigations of confidential material (which may include records of communications to clergy) maintained at a religious child care facility (p. 207-208; Defendants' Exhibit #25).

89. Section 2400.2 of the Minimum Standards requires that "the personal qualifications of employees shall be verified," and the records of that required verification, including references as to religious character, are open to state inspection and evaluation (p. 267).

90. Inspections of religious child care facilities by the Department of Human Resources are not tailored in any way in order to accommodate the statement in Section 42.001 of the Human Resources Code that the agency shall not involve itself in the form, manner, or

content of religious instruction in a religious facility (Deposition of Barbara Varner, page 20).

91. It is the policy of the Department of Human Resources, when making inspections of child care facilities, whether that inspection is announced or unannounced, to interview children residing in the Homes (Deposition of Barbara Varner, page 18).

92. In the past, licensing representatives of the predecessor agency to the Department of Human Resources have fomented unruly behavior by suggesting to children at the Homes that the program of care at the Homes is not in their best interest (p. 99-100).

93. Surveillance by the Department of Human Resources of the Homes operated by the Church has been continuous and extensive. Reports of these surveillances are routinely made, and indicate that undercover investigators go as far as to pose as Church members in order to gain access to religious worship services held at the Homes operated by the Church. These reports even detail contents of sermons and the hymns sung at the worship services (Defendants' Exhibit #26).

94. The surveillance techniques employed by Department of Human Resources personnel relative to the Church's Homes have included contacting children inside the Homes and soliciting communications from them in which the children are instructed to use code words which would have a special meaning to Department personnel (Defendants' Exhibit #28).

95. Investigative personnel, employed by the Department of Human Resources, who carried out surveillance of the Church's Homes, are trained in physical surveillance methods which stress surreptitious techniques (Defendants' Exhibits #27).

96. The surveillance of the Church's Homes by the Department of Human Resources has included the use of binoculars, cameras, tape recorders and the soliciting of information from persons connected with the Homes

or having any dealing with the Homes (Deposition of Cesar Luna, pages 11-13).

97. The Department of Human Resources exercises ultimate control over licensed child care institutions in the areas of: the care provided the children; the qualifications, competence and performance of child care administrators; finances; volunteer workers; and staff. In enforcing this ultimate power of control, DHR makes unannounced inspections of child care facilities, and requires facilities to open all records concerning staff, children and finances to DHR inspection and evaluation. Failure to submit to inspection and evaluation, or having submitted to such inspection and evaluation, being found lacking in any regard by the Department, can result, in the discretion of the Department, in refusal or withdrawal of permission to operate as a child care facility (p. 206-213; p. 237; p. 244; p. 250; p. 253; p. 261-262, p. 265-266).

98. The Texas Department of Human Resources has constituted a church relations advisory group to which are referred requests for variances from, or waivers of regulations which relate to religious issues (Deposition of Jonathton Hole, page 8).

IV. OBJECTIONS BY THE CHURCH TO THE LICENSING PROCESS.

99. The Church's objections to the application of the Human Resources Code to the program and employees at the Homes are rooted in the need to protect the religious nature of the Homes (p. 127).

100. The Department of Human Resources' judgments concerning adequacy of child care are informed by current theories of child care, and its complete discretion in applying those theories can result in advancement of one theory of child care over another. This can bring the Department into conflict with pervasively religious theories of child care (p. 266-267).

101. Institutional licensing representatives employed by the Department of Human Resources to assess the appropriateness of child placements are trained in concepts of human development which are inimical to fundamentalist Christian belief (Defendants' Exhibit #32, p. 331-332).

102. For Biblical reasons, fundamentalist Christians believe that God is sovereign over religious functions, and that the province of the state is to assure justice in the civil order. This has been so since the time of the early Christian Church where Christians were martyred for proclaiming Christ as sovereign rather than Caesar (p. 327-329).

103. The Church believes, on scriptural grounds, that ultimate authority — that is the authority to determine whether or not a religious ministry shall exist — over the Church's Homes belongs to the Lord Jesus Christ and not to any human government (p. 127).

104. In Fundamental Christianity, the concept of separation of church and state is Biblically based (p. 179; p. 328-329).

105. The Church objects, on Scriptural grounds, to any state licensing which would involve inspection, regulation or evaluation of any of the religious aspects of the operation of the Homes (p. 161).

106. The Church, and those individuals responsible for administration and operation of the Homes, believe that the state has the right to require licenses, permits, or certificates of churches in the areas of physical health and safety (p. 147).

107. The facilities operated by the Corpus Christi People's Baptist Church presently meet all applicable fire, safety and health regulations, and the Church does not object to inspections by fire, safety and health agencies in order to verify compliance with reasonable regulations (Defendants' Exhibits #5 and #6).

108. On religious grounds, the Church objects to the provision of the Human Resources Code (Section

42.046(c)) which requires state investigation of the plan of care for children used at the Homes. The care at the Homes is essentially religious and is inspired by Scripture (p. 163).

109. Section 4600.3(b) of the Minimum Standards requires outside evaluation of communications between children and their parents; the Church would oppose, on Scriptural grounds, such interference with the parent-child relationship (p. 172).

110. Although Texas state statutes require administrators of child care institutions to be licensed, such a licensing requirement is objected to by those at the Homes by reason of their religious belief that it is necessary for those pursuing a religious vocation to do so without first seeking permission from the state (p. 122; p. 164).

111. A great many of the questions on the DHR child care administrators' licensing examination are entirely irrelevant to practices which are followed at pervasively religious child care facilities (Defendants' Exhibit #31).

112. For reasons of religion, the Church objects to a provision of the Human Resources Code (Section 42.042(c)) which permits the state to assess the capabilities and qualifications of employees of the Homes since the qualities needed to perform the work of the Homes are spiritual in nature (p. 163-164).

113. The licensing requirements would make it difficult for the Homes to employ the "born again" Christians who they require as staff members (p. 122).

114. For reasons of its religion, the Church opposes state requirements which would compel the Homes to make financial disclosures to the State (p. 126-127).

115. The Church believes, on Scriptural grounds, that the just shall live by faith and depend upon God for finances. For this reason, the Homes cannot formulate the type of financial plan contemplated by state requirements (p. 126).

116. Section 1300.4 of the Minimum Standards requires the Church to submit a 12-month budget to the state; enforcement of such a requirement would negate the Church's Biblically grounded desire to "live by faith" (p. 173).

117. Section 4600.8 of the Minimum Standards states: "children in care shall not be required to perform at public gatherings." This section would prohibit children from being required to perform at religious services, if any part of the public is present (p. 177; p. 281-282).

118. Section 4200.6 of the Minimum Standards which requires children to participate in community activities, would undermine the methods of treatment used at the Homes (p. 171-172).

119. The Minimum Standard (Section 4600.13(d)) which prohibits "belittling" of the child would interfere with the religiously-based manner in which the children at the Homes are taught to recognize their sinful nature (p. 177).

120. The Minimum Standard (4600.6) which prohibits the Homes from reaching the children to acknowledge their dependency interferes with the established practice of the Homes to teach children to depend upon the Lord (p. 176).

121. The children who reside at the Homes believe that the closing of the Homes would have serious adverse effect on them (p. 54; p. 60).

122. The closing of the Homes would put those who live at the Homes back into the troubled life style they had pursued previously and would have a devastating impact on them (p. 83; p. 121).

123. A child who is removed from the Church's Homes and placed into a home which used other than primarily spiritual methods would be confused by the change in value system and the course of their spiritual regeneration or formation would be interrupted or halted (p. 309).

124. Expert testimony establishes that the closing of the Church's Homes will severely harm those children who are being helped by the Homes. These children, who now live in an atmosphere where religious authority pervades, could become sufficiently confused so as to consider the state, in claiming to exercise a power superior to the Church's relative to the religious mission of the Church, to have become God (p. 308).

125. The closing of the Homes would adversely affect the staff and administrators of the Homes, in that these people believe they have a religious calling to serve in these functions (p. 63-64; p. 121).

126. If the Homes are closed, the parents of children at the Homes will be adversely affected inasmuch as what many believe to be the last avenue of hope for their children will have been closed to them (p. 74).

V. *LACK OF COMPELLING STATE INTEREST IN AFFIXING THE LICENSING PROCESS TO CHURCH HOMES.*

127. Expert testimony establishes that when spiritual regeneration is employed to treat troubled children, it is not wise to subject children who are in a state of violence or extremely emotional upset to psychiatric or psychological counseling or treatment (p. 307).

128. Expert testimony establishes that in the case of a child who is undergoing spiritual conversion after a life of crime or other maladjustment, it is not beneficial for the child to be required to participate in functions outside of the institution, or to form friendships with persons outside of the institution (p. 307-308).

129. Expert testimony establishes that children with the type of personality problems that are exhibited by the children who are brought to the Church's Homes could become anti-social, self-destructive, sociopathic adults if not reformed before reaching adulthood (p. 299).

130. The treatment of children with severe behavioral disorders is the traditional province of social work, however, the discipline of social work does not have any settled method for dealing with these types of problems (p. 299-300).

131. The discipline of social work, as presently constituted, is incapable of acknowledging sin as the cause of aberrant behavior and of recognizing a conscious turning away from sin by conversion to Christ as a remedy for that behavior (p. 302-303).

132. Any person who engages in the spiritual regeneration of troubled children, in order to be effective, must possess special personal qualities, a belief in his or her ministry, and a belief in his or her vocational call to serve God in this manner (p. 305-306).

133. Traditional social work training, because it ignores the spiritual dimension of life, would not constitute adequate preparation for a person who engages in the practice of the spiritual regeneration of children. Nor would that training adequately prepare anyone for the task of evaluating that spiritual process (p. 306).

134. Expert testimony establishes that a degree in the field of social work or in some other behavioral science is not necessary in order to provide good child care and, in fact, may be counterproductive of that end (p. 340).

135. Expert testimony establishes that the state is not capable of engaging in inspection or evaluation of the spiritual regeneration of children (p. 306).

136. The Texas Department of Human Resources played a significant role in the drafting of the Child Care Licensing Act (Deposition of Jerome Chapman, pages 22 to 23).

137. It is not necessary for a child care institution to be state licensed in order to provide good child care (p. 415; p. 450-451).

138. The Church's Homes are operating successfully and well without state supervision or control of es-

sential aspects of their program (p. 117-120; p. 159-160; p. 285-290; p. 303-304).

139. Expert testimony establishes that no system of government or regulation of child care facilities can guarantee the promotion of a child's welfare (p. 399).

140. The only requirements of a government agency with respect to provision of child care which can be demonstrated to be necessary and not harmful are those relating to health, safety and sanitation. As part of the state's interest in guaranteeing safety, it should also be permitted to require that persons employed in child care facilities not have been convicted of a crime involving moral turpitude (p. 344-345).

CONCLUSIONS OF LAW

1. The Free Exercise Clause of the First Amendment to the Constitution of the United States protects the rights of the Corpus Christi People's Baptist Church and its pastor to exercise their ministry for the regeneration of distressed children without the necessity to submit to the prior restraint of licensing as mandated by the Texas Human Resources Code.

2. The Establishment Clause of the First Amendment to the Constitution of the United States prohibits the excessive entanglements between church and state which would result from the application of the licensing requirements of the Texas Human Resources Code to the non-tax supported homes of the Corpus Christi People's Baptist Church.

3. The Free Exercise Clause of the First Amendment to the United States Constitution protects the rights of staff members employed in the homes of the Corpus Christi People's Baptist Church to pursue and exercise a religious vocation through service at the homes.

4. The Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth

Amendment to the United States Constitution protect the rights of distressed children to enjoy a Bible-centered means of regeneration at the homes operated by the Corpus Christi People's Baptist Church.

5. The Free Exercise Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment of the United States Constitution protect the rights of parents of distressed children to choose the Bible-centered means of regeneration offered by the Corpus Christi People's Baptist Church for their children.

6. The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the right of the Corpus Christi People's Baptist Church to utilize its own properties in ways which are promotive of the common good.

7. Application of the Texas Human Resources Code to the homes operated by the Corpus Christi People's Baptist Church would violate Article VI of the Constitution of the State of Texas by controlling and interfering with the rights of conscience of the Church, its pastor, the staff of the homes, children at the homes, and the parents of children at the homes in matters of religion.

8. The licensing and regulatory provisions of the Texas Human Resources Code would violate Article I, Section 19, of the Constitution of the State of Texas by depriving the Church, its pastor, the staff, children at the homes, and parents of these children of liberty and of property without due process of the law of the land.

9. The Texas Human Resources Code, if applied to the homes operated by the Corpus Christi People's Baptist Church, would violate Article II, Section 1, and Article III, Section 1, of the Constitution of the State of Texas, in that such application would permit an exercise of legislative powers by the executive branch known as the Texas Department of Human Resources.

10. Article I, Section 3(a) of the Constitution of the State of Texas would be violated by application of the

Texas Human Resources Code to the Corpus Christi People's Baptist Church, its pastor, the staff of the Church's child-care homes, children at the homes operated by the Church, and parents of these children, in that application of the Code would deny these parties equality under the law.

11. Application of the Texas Human Resources Code to the Corpus Christi People's Baptist Church, its pastor, the staff of the homes operated by the Church, children at the homes, and their parents, would violate 42 U.S.C. §1983 by depriving these individuals of civil rights secured to them by the Constitution of the United States.

Signed this 25th day of June, 1981.

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, JOHN DICKSON, Clerk of the District Courts, within and for the State and County of aforesaid, do hereby certify that the within and foregoing is a true and correct copy of

ORDER
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

in Cause No. 297,248, wherein

THE STATE OF TEXAS

Plaintiff,

VS.

CORPUS CHRISTI PEOPLE'S
BAPTIST CHURCH, ET AL

Defendants,

as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 14th day of July, 1981

JOHN DICKSON
Clerk, District Courts, Travis County, Texas

By_____
Deputy

NO. 297,248

THE STATE OF TEXAS	:	IN THE DISTRICT COURT
	:	
VS.	:	200TH JUDICIAL DISTRICT
	:	
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., et al.	:	TRAVIS COUNTY, TEXAS May 27, 1981

JUDGMENT

On the 17th day of November, 1980, came on to be heard the above entitled and numbered cause and the State of Texas, Plaintiff, appeared in person and by attorney of record and announced ready for trial, and Roloff Evangelistic Enterprises, Inc. Alfred Edge, G. G. Rost, Mark Armstrong, Frances Price, Ida Cavitt, James Thomas, Betty Yoder, Helen Bradley, Corpus Christi People's Baptist Church, Inc., Wiley Cameron, Robert Galloway, Frances Galloway, Fay Cameron, Lester Roloff, and The People's Church, the Defendants, appeared in person and by attorney of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court and the case proceeded to trial.

At the conclusion of the evidence, Defendants Roloff Evangelistic Enterprises, Inc., Alfred Edge, G. G. Gross, Mark Armstrong, Frances Price, Ida Cavitt, James Thomas, Betty Yoder, and Helen Bradley moved for an instructed verdict. The Court, having considered the Motion, granted said Motion and ordered that the style of the case be changed to: State of Texas vs. Corpus Christi People's Baptist Church, Inc., Wiley Cameron, Robert Galloway, Frances Galloway, Fay Cameron, Lester Roloff, The People's Church, Defendants and Janet and Alexander Forhetz, Michael and Norma Gross, Diane Forhetz, Gay Gross, Shari Compton and Stanley Williams, Defendant Intervenors.

The Court, after hearing the evidence and arguments of counsel, is of the opinion that all relief sought by Plaintiff should be denied.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff take nothing by this suite and that the Defendant be in all things discharged and go hence without day. All costs of Court are taxed against the Plaintiff for which let execution issue.

All other relief not expressly granted herein is denied.

SIGNED this 27th day of May, 1981.

_____

Judge Presiding

APPROVED AS TO FORM:

_____

Richard Arnett
Attorney for Plaintiff

_____

William B. Ball
Attorney for Defendants

Cause No. 297,248
The State of Texas
vs.
Roloff Evangelistic Enterprises Inc., et al.

__X__1. Final Judgment ____2. Order of Dismissal
____3. Injunction
____4. Order sustaining Plea of Privilege
____5. Order Overruling Plea of Privilege

An order as above indicated has been entered by the District Court of Travis County, Texas, in the above numbered and entitled cause.

JOHN DICKSON
District Clerk

APPENDIX D

THE STATE OF TEXAS

TO THE DISTRICT COURT OF TRAVIS COUNTY GREETING

Before our Supreme Court on the 19th day of December, A.D. 1984, the Cause, upon writ of error, to revise or reverse your judgment between

The State of Texas vs. Corpus Christi People's Baptist Church, Inc. et al., No. C-3265 in the Supreme Court of Texas.

No. 297, 248 in the District Court of Travis (200th) County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

"This cause was heard on writ of error from the Court of Appeals for the Tenth Supreme Judicial District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

"It is the opinion of the court, (authored by Chief Justice Pope), there was error in the judgments of the courts below which denied the State's prayer for injunction as the State has no interest in the religious doctrines that People's Baptist has had in the past or in the future. However, the State has a compelling interest in protecting the children in child-care facilities as to health, safety, and well being.

"In accordance with the opinion of this court.

it is ordered that:

1) the judgments of the court of appeals and the trial court are reversed.

2) The cause is remanded to the trial court with instructions to enjoin the Corpus Christi People's Baptist Church from operating the three homes until such time as it procures a license from the State.

3) Corpus Christi People's Baptist Church, Inc. et al. shall pay the costs in this court and the court of appeals.

4) The State of Texas shall recover the costs it incurred in those courts from Corpus Christi People's Baptist Church, Inc. et al.

"A copy of this judgment with a copy of the opinion shall be certified to the District Court of Travis County, Texas for observance."

(Opinion by Chief Justice Pope)

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Honorable John L. Hill, Chief Justice of our said Supreme Court, with the seal thereof annexed, at the city of Austin, this the 14th day of February A.D. 1985.

MARY M. WAKEFIELD,
Clerk.

(RE: NO. 297, 248 in the 200th District Court, Travis County

NO. C-3265 in the Supreme Court of Texas

VS.

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. ET AL.

THE STATE OF TEXAS

Bill of Costs	Charges	Paid	Remarks
Application for writ of error filing fee	$ 50.00		
Application fee on granting application	75.00		
Costs in Court of Appeals 10th District	25.00		
Transcript fee	168.00	Unknown	
Statement of facts fee (duplicate)	308.00	Unknown	
			Court Reporter—Joy D. Cox
Total costs	$626.00		
			Costs in this Court and Court of Appeals taxed against Corpus Christi People's Baptist Church. The State shall recover its costs in those Courts from Corpus Christi People's Baptist Church

MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas do hereby certify that the above and foregoing is a true and correct copy of the cost bill of the Supreme Court of Texas, showing the charges and payments, in the above numbered and styled cause, as the same appears of record in this office.

IN TESTIMONY WHEREOF, witness my hand and the SEAL of the Supreme Court of Texas, at the City of Austin, this the 14th day of February, 1985.

MARY M. WAKEFIELD, CLERK

APPENDIX E

ORDER OF THE COURT

February 26, 1985

NO. C-3265	)	
	)	
THE STATE OF TEXAS	)	
	)	
vs.	)	From Travis County,
	)	Tenth District
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. ET AL.	)	

Motion to Stay Mandate on behalf of CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. ET AL. filed herein on February 20, 1985 having been duly considered,

it is order that:

1. said Motion to Stay Mandate be, and hereby is, granted.

2. The mandate of this Court will not issue for ninety days from February 13, 1985 to allow time for filing a Writ of Certiorari in the United States Supreme Court.

3. If the Writ of Certiorari is filed in the United States Supreme Court within the ninety days then the mandate will be stayed until this Court receives notice from the United States Supreme Court of its action.

I, MARY WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the above numbered and styled case as said order appears in the minutes of this Court under the date indicated.

IN TESTIMONY WHEREOF, witness my hand and the

SEAL OF THE SUPREME
COURT OF TEXAS
at the City of Austin
this the 26th day of February, 1985

MARY M. WAKEFIELD, Clerk

APPENDIX F

IN THE SUPREME COURT OF TEXAS

ORDER

February 13, 1985

NO. C-3265	)	
	)	
THE STATE OF TEXAS	)	
	)	From Travis County,
vs.	)	
	)	Tenth District
CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH INC. et al.	)	

Respondents' motion for rehearing of the above numbered and styled cause filed herein on January 2, 1985 having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * *

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of this Court as said order appears in the minutes of this Court under the date indicated.

IN TESTIMONY WHEREOF, witness my hand and the

SEAL OF THE SUPREME
COURT OF TEXAS,
at the City of Austin,
this the 2nd day of May, 1985

MARY M. WAKEFIELD, Clerk

APPENDIX G

NO. C-3265

IN THE SUPREME COURT OF TEXAS

THE STATE OF TEXAS

Petitioner,

v.

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH INC., *et al.*,

Respondents

Notice of Appeal to the
Supreme Court of the United States

Notice is hereby given that Corpus Christi People's Baptist Church, *et al.*, the Respondents above named, hereby appeal from the final judgment of the Supreme Court of Texas, entered in this action on February 13, 1985, reversing the judgment of the Texas Court of Appeals.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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By_____
Ann E. Coover
Attorneys for Respondents

Filed: April 30, 1985, in the Supreme Court of Texas

APPENDIX H

CHAPTER 42.
REGULATION OF CHILD-CARE FACILITIES

SUBCHAPTER A. GENERAL PROVISIONS

Section 42.001. Purpose

The purpose of this chapter is to protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program. It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs. It is also the intent of the legislature that freedom of religion of all citizens is inviolate, and nothing in this chapter gives a governmental agency authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization.

§ 42.002. Definitions

In this chapter:

(1) "Child" means a person under 18 years of age.

(2) "Division" means the division designated by the department to carry out the provisions of this chapter.

(3) "Child-care facility" means a facility that provides care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day,

whether or not the facility is operated for profit or charges for the services it offers.

(4) "Child-care institution" means a child-care facility that provides care for more than 12 children for 24 hours a day, including facilities known as children's homes, halfway houses, residential treatment camps, emergency shelters, and training or correctional schools for children.

(5) "Foster group home" means a facility that provides care for 7 to 12 children for 24 hours a day.

(6) "Foster family home" means a facility that provides care for not more than six children for 24 hours a day.

(7) "Day-care center" means a facility that provides care for more than 12 children under 14 years of age for less than 24 hours a day.

(8) "Group day-care home" means a facility that provides care for 7 to 12 children under 14 years of age for less than 24 hours a day.

(9) "Registered family home" means a facility that regularly provides care in the caretaker's own residence for not more than six children under 14 years of age, excluding the caretaker's own children, and that provides care after school hours for not more than six additional elementary school siblings of the other children given care, but the total number of children, including the caretaker's own, does not exceed 12 at any given time.

(10) "Family day home" means a facility that provides care for not more than six children under 14 years of age for less than 24 hours a day not in the caretaker's own residence nor in the residence of one or more of the children.

(11) "Agency home" means a private home that provides care for not more than six children, that is used only by a licensed child-placing agency, and that meets division standards.

(12) "Child-placing agency" means a person other than the natural parents or guardian of a child who plans for the placement of or places a child in an institution, agency home, or adoptive home.

(13) "Facilities" includes child-care facilities and child-placing agencies.

(14) "State of Texas" or "state" does not include political subdivisions the state.

§ 42.002. Definitions

In this chapter:

[See main volume for text of (1) to (14)]

(15) "Religious organization" means a church, synagogue, or other religious institution whose purpose is to support and serve the propagation of truly held religious beliefs.

Amended by Acts 1981, 67th Leg., p. 2812, ch. 759, § 1, eff. Aug. 31, 1981.

1981 Amendment. Added subd. (15).

SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

§ 42.021. Division Designated

(a) The department shall designate a division within the department to regulate and license child-care facilities and child-placing agencies. The division shall enforce the provisions of this chapter and the rules and standards adopted by the department under this chapter and shall carry out other responsibilities the department may delegate or assign.

(b) The commissioner of the department shall appoint as director of the division a person who:

(1) meets the qualifications required of a child-care administrator by Chapter 43 of this code;

(2) holds a graduate degree in social science or law and has five years' administrative experience in a field related to child care; or

(3) has 10 years' experience in a field related to child care at least 5 of which must be administrative.

(c) The department shall employ sufficient personnel and provide training for the personnel to carry out the provisions of this chapter.

(d) The director may divide the state into regions for the purpose of administering this chapter.

§ 42.022. State Advisory Committee

(a) The State Advisory Committee on Child-Care Facilities is composed of 15 citizens of this state appointed by the commissioner.

(b) Members of the committee serve for terms of two years.

(c) The members must represent the following groups:

(1) parents, guardians, or custodians of children who use the facilities;

(2) child advocacy groups;

(3) operators of the facilities; and

(4) experts in various professional fields that are relevant to child care and development.

(d) At least three members of the division staff shall meet with the committee, and the division shall provide staff necessary for the committee.

(e) The committee shall review rules and minimum standards for child-care facilities and child-placing agencies promulgated by state agencies, and shall advise the department, the division, the council, and state agencies on problems of child-care facilities and child-placing agencies.

(f) The committee shall receive and review the annual report of the division.

(g) The committee shall meet twice a year, and the members shall receive their actual travel expenses and the state per diem.

§ 42.023. Annual Report

(a) The division shall send an annual report of its activities to the governor, lieutenant governor, and members of the legislature.

(b) The annual report shall include:

(1) a report by regions of applications for licensure or certification, of provisional licenses issued, denied, or revoked, of licenses issued, denied, suspended or revoked, of emergency closures and injunctions, and of the compliance of state-operated agencies with certification requirements;

(2) a summary of the amount and kind of in-service training and other professional development opportunities provided for division staff;

(3) a summary of training and other professional development opportunities offered to facilities' staffs; and

(4) a report of new administrative procedures, of the number of staff and staff changes, and of plans for the coming year.

(c) Copies of the annual report shall be available to any state citizen on request.

§ 42.024. Administrative Procedure

The Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) applies to all procedures under this chapter except where it is contrary to or inconsistent with the provisions of this chapter.

SUBCHAPTER C. REGULATION OF CHILD-CARE FACILITIES

§ 42.041. Required License

(a) No person may operate a child-care facility or child-placing agency without a license issued by the division.

(b) This section does not apply to:

(1) a state-operated facility;

(2) an agency home;

(3) a facility that is operated in connection with a shopping center, business, religious organization, or establishment where children are cared for during short periods while parents or persons responsible for the children are attending religious services, shopping, or engaging in other activities on or near the premises, including but not limited to retreats or classes for religious instruction;

(4) a school or class for religious instruction that does not last longer than two weeks and is conducted by a religious organization during the summer months;

(5) a youth camp licensed by the Texas Department of Health;

(6) a hospital licensed by the Texas Department of Mental Health and Mental Retardation or the Texas Department of Health;

(7) an educational facility accredited by the Central Education Agency or the Southern Association of Colleges and Schools that operates primarily for educational purposes in grades kindergarten and above;

(8) an educational facility that operates solely for educational purposes in grades kindergarten through at least grade two, that does not provide custodial care for more than one hour during the hours before or after the customary school day, and that is a member of an organization that promulgates, publishes, and requires compliance with health, safety, fire, and sanitation standards equal to standards required by state, municipal, and county codes;

(9) a kindergarten or preschool educational program that is operated as part of a public school or a private school accredited by the Central Education Agency, that offers educational programs through grade six, and that does not provide custodial care during the hours before or after the customary school day;

(10) a registered family home.

(c) A single license that lists addresses and the appropriate facilities may be issued to a child-care institution that operates noncontiguous facilities that are nearby and that are demonstrably a single operation as indicated by patterns of staffing, finance, administrative supervision, and programs.

§ 42.041. Required License

[See main volume for text of (a)]

(b) This section does not apply to:

(1) a state-operated facility;

(2) an agency home;

(3) a facility that is operated in connection with a shopping center, business, religious organization, or establishment where children are cared for during short periods while parents or persons responsible for the children are attending religious services, shopping, or engaging in other activities on or near the premises, including but not limited to retreats or classes for religious instruction;

(4) a school or class for religious instruction that does not last longer than two weeks and is conducted by a religious organization during the summer months;

(5) a youth camp licensed by the Texas Department of Health;

(6) a hospital licensed by the Texas Department of Mental Health and Mental Retardation or the Texas Department of Health;

(7) an educational facility accredited by the Central Education Agency or the Southern Association of Colleges and Schools that operates primarily for educational purposes in grades kindergarten and above;

(8) an educational facility that operates solely for educational purposes in grades kindergarten through at least grade two, that does not provide custodial care for more than one hour during the hours before or after the customary school day, and that is a member of an organization that promulgates, publishes, and requires compliance with health, safety, fire, and sanitation standards equal to standards required by state, municipal, and county codes;

(9) a kindergarten or preschool educational program that is operated as part of a public school or a private school accredited by the Central Education Agency, that offers educational programs through

grade six, and that does not provide custodial care during the hours before or after the customary school day;

(10) A registered family home; or

(11) an educational facility that is integral to and inseparable from its sponsoring religious organization or an educational facility both of which do not provide custodial care for more than two hours maximum per day, and that offers educational programs for children age five and above in one or more of the following: kindergarten through at least grade three, elementary, or secondary grades.

[See main volume for text of (c)]

(d) A person operating or desiring to operate a child-care facility that is exempt from the provisions of Subsection (a) of this section may apply to the division for a license as provided in Section 42.046 of this code. The division may not deny an exempt facility a license on the ground that it is exempt from Subsection (a) of this section. A facility exempt from the provisions of Subsection (a) of this section that desires to receive or participate in federal or state funding shall be required to comply with all other provisions of this Act and with all regulations promulgated thereunder.

(e) The exemptions provided by Subsection (b) of this section do not affect the authority of local, regional, or state health department officials, the state fire marshal, or local fire prevention officials to inspect child-care facilities.

Amended by Acts 1981, 67th Leg., p. 2812, ch. 759, §§ 2, 3, eff. Aug. 31, 1981.

1981 Amendment. In subsec. (b), subd. (9), deleted "and" at the end, in subd. (10) substituted "; or" for a period, and added subd. (11); added subsecs. (d) and (e).

§ 42.042. Rules and Standards

(a) The department shall make rules to carry out the provisions of this chapter.

(b) The department shall conduct a comprehensive review of all rules and standards at least every six years.

(c) The department shall provide a standard procedure for receiving and recording complaints and a standard form for recording complaints.

(d) The department shall provide standard forms for applications and inspection reports.

(e) The department shall promulgate minimum standards for child-care facilities covered by this chapter that will:

(1) promote the health, safety, and welfare of children attending a facility;

(2) promote safe, comfortable, and healthy physical facilities for children;

(3) ensure adequate supervision of children by capable, qualified, and healthy personnel;

(4) ensure adequate and healthy food service where food service is offered;

(5) prohibit racial discrimination by child-care facilities; and

(6) require procedures for parental and guardian consultation in the formulation of children's educational and therapeutic programs.

(f) In promulgating minimum standards for child-care facilities, the department shall recognize the various categories of facilities, including facilities offering specialized care, and the various categories of children and their particular needs. Standards for child-care institutions must require an intake study before a child is placed in an institution. The intake study may be con-

ducted at a community mental health and mental retardation center.

(g) In promulgating minimum standards the department may recognize and treat differently the following child-care facilities: child-caring institutions, foster homes, day-care centers, group day-care homes, family day homes, registered family homes, and agency homes.

(h) The department shall promulgate minimum standards for child-placing agencies.

(i) Before adopting minimum standards, the division shall present the proposed standards to the State Advisory Committee on Child-Care Facilities for review and comment, and shall send a copy of the proposed standards to each licensee covered by the proposed standards at least 60 days before the standards take effect to provide the licensee an opportunity to review and to send written suggestions to the council and the department.

(j) The department may waive compliance with a minimum standard in a specific instance if it determines that the economic impact of compliance is sufficiently great to make compliance impractical.

(k) The department may not regulate or attempt to regulate or control the content or method of any instruction or curriculum of a school sponsored by a religious organization.

§ 42.043. Rules for Immunizations

(a) The department shall make rules for the immunization of children admitted to facilities.

(b) The department shall require that each child at an appropriate age have a test for tuberculosis and be immunized against diphtheria, tetanus, poliomyelitis, rubella, and rubeola. The immunization must be effective on the date of first entry into the facility. However, a child may be provisionally admitted if the required im-

munizations have begun and are completed as rapidly as medically feasible.

(c) The Texas Department of Health shall make rules for the provisional admission of children to facilities and may modify or delete any of the immunizations listed in Subsection (b) of this section or require additional immunizations as a requirement for admission to a facility.

(d) No immunization may be required for admission to a facility if a person applying for a child's admission submits one of the following affidavits:

(1) an affidavit signed by a licensed physician stating that the immunization would be injurious to the health and well-being of the child or a member of the child's family or household; or

(2) an affidavit signed by the child's parent or guardian stating that the immunization conflicts with the tenets and practices of a recognized religious organization of which the applicant is an adherent or a member.

(e) Each facility shall keep an individual immunization record for each child admitted, and the records shall be open for inspection by the division at all reasonable times.

(f) The Texas Department of Health shall provide the immunizations required by this section to children in areas where there is no local provision of these services.

§ 42.044. Inspections

(a) An authorized representative of the division may visit a facility during operating hours to investigate, inspect, and evaluate.

(b) The division shall inspect all licensed or certified facilities at least once a year and may inspect other facilities as necessary. At least one of the annual visits must be unannounced and all may be unannounced.

(c) The division must investigate a facility when a complaint is received. The division representative must notify the facility's director or authorized representative when a complaint is being investigated and report in writing the results of the investigation to the director or the director's authorized representative.

(d) The division may call on political subdivisions and governmental agencies for assistance within their authorized fields.

§ 42.045. Records

(a) A person who operates a licensed or certified facility shall maintain individual child development records, individual health records, statistical records, and complete financial records.

(b) A person who operates a licensed facility shall have an annual audit by a certified public accountant of the facility's books. A copy of the accountant's statement of income and disbursements must accompany an application for a license. This subsection does not apply to a facility that provides care for less than 24 hours a day or to an agency home.

§ 42.045. Records

[See main volume for text of (a) and (b)]

(c) If a child-placing agency terminates operation as a child-placing agency, it shall, after giving notice to the department, transfer its files and records concerning adopted children, their biological families, and their adoptive families to the department or to a facility licensed by the department to place children for adoption.

Amended by Acts 1983, 68th Leg., p. 1782, ch. 342, § 2, eff. Jan. 1, 1984.

1983 Amendment. Added subsec. (c).

§ 42.046. License Application

(a) An applicant for a license to operate a child-care facility or child-placing agency shall submit to the division a completed application on a form provided by the division.

(b) The division shall supply the applicant the application form and a copy of the appropriate minimum standards.

(c) After receiving an application, the division shall investigate the applicant and the plan of care for children.

(d) The division shall complete the investigation and decide on an application within two months after the date the division receives an application.

§ 42.047. Consultations

(a) The department shall offer consultation to potential applicants, applicants, and license and certification holders about meeting and maintaining standards for licensing and certification and achieving programs of excellence in child care.

(b) The department shall offer consultation to prospective and actual users of facilities.

§ 42.048. Advisory Opinions

(a) The director of the division may give an advisory opinion on whether or not a planned facility or a planned change in an existing facility complies with the division's rules and minimum standards.

(b) A written opinion authorized by Subsection (a) of this section is binding on the division as a declaratory order if it is signed by the division director and the division representative administering this chapter in a division region, and if an applicant or license holder has acted in reliance on the opinion.

§ 42.049. Licensing

(a) The division shall issue a license after determining that an applicant has satisfied all requirements.

(b) When issuing a license, the division may impose restrictions on a facility, including but not limited to the number of children to be served and the type of children to be served.

(c) The division may grant a variance of an individual standard set forth in the applicable standards for good and just cause.

(d) A license holder must display a license issued under this chapter in a prominent place at the facility.

(e) A license issued under this chapter is not transferable and applies only to the operator and facility location stated in the license application. A change in location or ownership automatically revokes a license.

(f) A biennial license must be issued if the division determines that a facility meets all requirements. The evaluation shall be based on a specified number of visits to the facility and a review of all required forms and records.

§ 42.050. License Renewal

(a) A license holder may apply for a new license in compliance with the requirements of this chapter and the rules promulgated by the division.

(b) The application for a new license must be completed and decided on by the division before the expiration of the license under which a facility is operating.

(c) The division shall evaluate the application for a new license to determine if all licensing requirements are met. The evaluation must include a specified number of visits to the facility and a review of all required forms and records.

§ 42.051. Provisional License

(a) The division shall issue a provisional license when a facility's plans meet the department's licensing requirements and one of the following situations exists:

(1) the facility is not currently operating;

(2) the facility is not licensed for the location stated in the application; or

(3) there is a change in ownership of the facility.

(b) A provisional license is valid for six months from the date it is issued and is not renewable.

§ 42.052. Certification and Registration

(a) A state-operated child-care facility or child-placing agency must receive certification of approval from the division. The certification of approval must be renewed every two years.

(b) To be certified, a facility must comply with the department's rules and standards and any provisions of this chapter that apply to a licensed facility of the same category. The operator of a certified facility must display the certification in a prominent place at the facility.

(c) A registered family home must be registered with the division.

(d) To be registered with the division, a registered family home must comply with the department's rules and standards and any provision of this chapter that applies to a registered family home.

§ 42.052. Certification and Registration

[See main volume for text of (a) to (d)]

(e) The certification requirements of this section do not apply to a Texas Youth Council facility or a facility providing services solely for the Texas Youth Council.

Amended by Acts 1981, 67th Leg., p. 2813, ch. 759, § 4, eff. Aug. 31, 1981

1981 Amendment. Added subsec. (e).

§ 42.053. Agency Homes

(a) An agency home is considered part of the child-placing agency that operates the agency home for purposes of licensing.

(b) The operator of a licensed agency shall display a copy of the license in a prominent place in the agency home used by the agency.

(c) An agency home shall comply with all provisions of this chapter and all department rules and standards that apply to a child-care facility caring for a similar number of children for a similar number of hours each day.

(d) The division shall revoke or suspend the license of a child-placing agency if an agency home operated by the licensed agency fails to comply with Subsection (c) of this section.

SUBCHAPTER D. REMEDIES

§ 42.071. License Suspension

(a) The division may suspend the license of a facility that has temporarily ceased operation but has definite plans for starting operations again within the time limits of the issued license.

(b) The division may suspend a facility's license for a definite period rather than deny or revoke the license if the division finds repeated noncompliance with standards that do not endanger the health and safety of children. To qualify for license suspension under this subsection, a facility must suspend its operations and show that standards can be met within the suspension period.

(c) The division shall revoke the license of a facility that does not comply with standards after a license suspension.

§ 42.071. License Suspension and Probation

(a) The division may suspend the license of a facility that has temporarily ceased operation but has definite plans for starting operations again within the time limits of the issued license.

(b) The division may suspend a facility's license for a definite period rather than deny or revoke the license if the division finds repeated noncompliance with standards that do not endanger the health and safety of children. To qualify for license suspension under this subsection, a facility must suspend its operations and show that standards can be met within the suspension period.

(c) The division may place a facility on probation for a definite period not to extend beyond the expiration date of the license rather than suspend or revoke the license. The division may revoke the license of the facility during the probationary period if the facility does not meet the conditions of probation.

(d) The division shall revoke the license of a facility that does not comply with standards at the end of a license suspension or probation.

Amended by Acts 1983, 68th Leg., p. 111, ch. 23, § 1, eff. Aug. 29, 1983.

1983 Amendment. Inserted "and probation" in the section heading; inserted subsec. (c); redesignated subsec. (c) as subsec. (d); and in subsec. (d) substituted "at the end of" for "after" and added "or probation."

§ 42.072. License Denial or Revocation

(a) The division shall deny or revoke the license or certification of approval of a facility that does not comply with the requirements of this chapter, the standards and

rules of the department, or the specific terms of the license or certification.

(b) The division shall notify the person operating or proposing to operate a facility of the reasons for the denial or revocation and of the person's right to appeal the decision within 30 days after receiving the notice.

(c) A person who wishes to appeal a license denial or revocation shall notify the director by certified mail within 30 days after receiving the notice required in Subsection (b) of this section. The person shall send a copy of the notice of appeal to the assigned division representative.

(d) Within 14 days after the date of appeal notification was mailed, the director shall appoint an advisory review board to hear the appeal or notify the person requesting the appeal that the request is denied.

(e) Within 14 days after notifying a person that an advisory review board will hear the case, the director shall appoint five of the person's peers to the board and set a date for the hearing. The date for the hearing must be within 28 days after the date the board members are appointed.

(f) The advisory review board shall hear the appeal and render its opinion to the director within seven days after the last day of the hearing. The board members shall receive actual travel expenses and the state per diem for each day of the hearing.

(g) A committee composed of the director, the division representative responsible for establishing standards, and the division representative administering this chapter in the region where the facility in question is located shall review the opinion. The committee shall make a decision within 14 days after receiving the opinion and shall notify, by certified mail, the person who appealed.

(h) A person whose license has been denied or revoked may challenge the committee's decision by filing a suit in a district court of Travis County or the county in

which the person's facility is located within 30 days after receiving the committee's decision. The trial shall be de novo.

(i) Records of the department's hearing shall be kept for one year after a committee decision is rendered. On request, and at the person's own expense, the division shall supply a copy of the verbatim transcript of the advisory board hearing to a person appealing a license denial or revocation in district court.

(j) A person may continue to operate a facility during an appeal of a license denial or revocation unless the division has sought injunctive relief under Section 42.074 or civil penalties under Section 42.075 of this code.

§ 42.072. License Denial or Revocation

(a) The division may deny or revoke the license or certification of approval of a facility that does not comply with the requirements of this chapter, the standards and rules of the department, or the specific terms of the license or certification.

[See main volume for text of (b) to (j)]

Amended by Acts 1983, 68th Leg., p. 111, ch. 23, §2, eff. Aug. 29, 1983.

1983 Amendment. Substituted "may" for "shall" in subsec. (a).

§ 42.073. Closing a Facility

(a) The division may close the facility and place the children attending the facility in another facility if the division finds violations of this chapter or violations of the department's rules and standards that create an immediate danger for children.

(b) A division representative who finds conditions described in Subsection (a) of this section shall immediately notify the director and request an immediate inspection of the facility by the director or the director's designee.

(c) The division shall report to the governor and the commissioner of the department when a state-operated facility is found in violation of this chapter or the department's rules and standards and the violation threatens serious harm to the children in the facility.

(d) Closing a facility under this section is an emergency measure. The division shall seek an injunction against continued operation of the facility after closing a facility under this section.

§ 42.074. Injunctive Relief

(a) When it appears that a person has violated, is violating, or is threatening to violate the licensing, certification, or registration requirements of this chapter or the department's licensing, certification, or registration rules and standards, the division may file a suit in a district court in Travis County or in the county where the facility is located for assessment and recovery of civil penalties under Section 42.075 of this code, for injunctive relief, including a temporary restraining order, or for both injunctive relief and civil penalties.

(b) The district court shall grant the injunctive relief the facts may warrant.

(c) At the division's request, the attorney general shall conduct a suit in the name of the State of Texas for injunctive relief, to recover the civil penalty, or for both injunctive relief and civil penalties as authorized by Subsection (a) of this section.

§ 42.075. Civil Penalty

(a) A person is subject to a civil penalty of not less than $50 nor more than $100 for each day of violation and for each act of violation if the person:

(1) threatens serious harm to a child in a facility by violating a provision of this chapter or a department rule or standard;

(2) violates a provision of this chapter or a department rule or standard three or more times within a 12-month period; or

(3) places a public advertisement for an unlicensed facility.

(b) The civil penalty authorized by this section is cumulative and in addition to the criminal penalties and injunctive relief provided by this chapter.

§ 42.076. Criminal Penalties

(a) A person who operates a child-care facility or child-placing agency without a license commits a Class B misdemeanor.

(b) A person who places a public advertisement for an unlicensed facility commits a Class C misdemeanor.

CHAPTER 43.
REGULATION OF CHILD-CARE ADMINISTRATORS

Section 43.001. Definitions

In this chapter:

(1) "Child-care institution" means a profit or nonprofit children's home, orphanage, institution, or other place that receives and provides 24-hour-a-day care for more than six children who are dependent, neglected, handicapped, delinquent, in danger of becoming delinquent, or in need of group care.

(2) "Child-care administrator" means a person who supervises and exercises direct administrative control over a child-care institution and who is responsible for its program and personnel, whether or not the person has an ownership interest in the institution or shares duties with other persons.

§ 43.002. Advisory Council

(a) The board shall appoint an advisory council on child-care administration composed of six persons with experience in the fields of child care or social work.

(b) Each member of the council serves a term of two years from the date of appointment. The members are entitled to reimbursement for actual expenses incurred in performing official duties.

(c) The council shall advise the board on licensing child-care administrators, including the content of the examination administered to license applicants.

§ 43.003. License Required

A person may not serve as a child-care administrator of a child-care institution without a license issued by the department under this chapter.

§ 43.004. Qualifications for License

To be eligible for a child-care administrator's license a person must:

(1) present evidence in writing of good moral character, ethical commitment, and sound physical and emotional health;

(2) pass an examination devised and administered by the department that demonstrates competence in the field of child-care administration;

(3) have one year of experience in management or supervision of child-care personnel and programs; and

(4) have one of the following educational and experience qualifications:

(A) a master's or doctor of philosophy degree in social work or other area of study;

(B) a bachelor's degree and two years' experience in child care or a closely related field;

(C) an associate degree from a junior college and four years' experience in child care or a closely related field; or

(D) a high school diploma or its equivalent and six years' experience in child care or a closely related field.

§ 43.005. Rules

The board may make rules to administer the provisions of this chapter.

§ 43.006. Examination Fee

To cover the cost of administering the examination, the department shall charge a fee of $25 to each person taking the examination for a license.

§ 43.006. Fees

The board may set and charge fees for administering an examination and issuing an initial license or renewal license in amounts necessary to cover the costs of administering this chapter.

Amended by Acts 1983, 68th Leg., p. 386, ch. 81, § 13(a), eff. Sept. 1, 1983.

1983 Amendment. Rewrote the section heading and the text.

Section 13(d) of the 1983 amendatory act provides:

"Until the Texas Department of Human Resources establishes different fees, those fees prescribed by Sections 43.006, 43.007, and 43.009, Human Resources Code, on August 31, 1983, remain in effect."

§ 43.007. License Application

(a) A person who has the education and experience required by Section 43.004 of this code may apply to the department for a license.

(b) The applicant shall send a license fee of $25 with the application.

§ 43.007. License Application

(a) A person who has the education and experience required by Section 43.004 of this code may apply to the department for a license.

(b) The applicant shall send the appropriate license fee with the application.

Amended by Acts 1983, 68th Leg., p. 386, ch. 81, § 13(b), eff. Sept. 1, 1983.

1983 Amendment. In subsec. (b) substituted "the appropriate license fee" for "a license fee of $25".

Section 13(d) of the 1983 amendatory act provides:

> "Until the Texas Department of Human Resources establishes different fees, those fees prescribed by Sections 43.006, 43.007, and 43.009, Human Resources Code, on August 31, 1983, remain in effect."

§ 43.008. Licensing

(a) The department shall issue a license to a person who has satisfied all the licensing requirements.

(b) The license is valid for a period of two years from the date issued.

§ 43.009. License Renewal

(a) To be eligible for license renewal, a license holder shall present evidence to the department of participation in a program of continuing education approx-

imately 15 actual hours of formal study during the two-year period before the renewal.

(b) The continuing education requirement may be fulfilled by studies in the areas of legal aspects of child care, concepts related to the field of social work, or other subjects approved by the department.

(c) The fee for a license renewal is $25.

§ 43.009. License Renewal

[See main volume for text of (a) and (b)]

(c) Repealed by Acts 1983, 68th Leg., p. 386, ch. 81, § 13(c), eff. Sept. 1, 1983.

Amended by Acts 1983, 68th Leg., p. 386, ch. 81, § 13(c), eff. Sept. 1, 1983.

1983 Amendment. Repealed subsec. (c). Section 13(d) of the 1983 repealing act provides:

> "Until the Texas Department of Human Resources establishes different fees, those fees prescribed by Sections 43.006, 43.007, and 43.009, Human Resources Code, on August 31, 1983, remain in effect."

§ 43.010. License Revocation

The department may revoke a license if the license holder is:

(1) convicted of a felony;

(2) convicted of a misdemeanor involving fraud or deceit;

(3) addicted to a dangerous drug or intemperate in the use of alcohol; or

(4) grossly negligent in performing duties as a child-care administrator.

§ 43.011. Appeals

(a) A person whose license application is denied or whose license is revoked is entitled to written notice of the reasons and may request that the department provide a hearing.

(b) The hearing shall be held within 30 days after the date the department receives the request.

(c) If the hearing results in the department upholding the license denial or revocation, the person may challenge the department's decision by filing suit in a district court in the county where the person resides within 30 days after the date the person receives notice of the department's final decision.

(d) The trial shall be de novo.

§ 43.012. Penalty

A person who serves as a child-care administrator without the license required by this chapter commits a Class C misdemeanor and may be fined not less than $50 nor more than $100.

APPENDIX I

SUBCHAPTER J. STANDARDS FOR INSTITUTIONS PROVIDING BASIC CHILD CARE

§83.601 (326.91.07.001). Legal Basis for Operation.

(a) Institutions (other than those owned by a sole proprietor) shall make available documentation of their legal basis for operation to the Licensing Branch of the Texas Department of Human Resources. The Licensing Branch shall be notified of any changes in the legal basis for operation. The legal basis for operation shall be documented in one of the following ways:

(1) A corporation shall make available a copy of the articles of incorporation and certificate of incorporation.

(2) Institutions operated by state agencies or other governmental entities shall make available documentation of enabling legislation and a copy of a constitution or bylaws, if such exists.

(3) Institutions operated by a partnership or association shall make available partnership agreements or documents reflecting the existence or creation of an association.

(b) Corporations and churches shall make available to the department a copy of the resolution authorizing the operation of the facility.

§83.602 (326.91.07.002). Governing Body Responsibilities.

(a) All facilities shall have a governing body that is responsible for and has authority over the policies and activities of the institution. If an institution is owned by a partnerhsip, the partners shall be regarded as the governing body for the purposes of this section. If an institution is owned by a sole proprietor, the responsibilities

imposed on a governing body by this section shall be borne by that proprietor. Institutions that are owned corporately shall provide the department with a list of names, addresses, and titles of officers or executive committee of the governing body, or both. Institutions that are owned jointly or individually shall provide the department with a list of names and addresses of the partners or owners. The Licensing Branch shall be notified of any changes.

(b) The governing body shall be responsible for policies and programs, for ensuring adequate financing, and for ensuring compliance with minimum standards.

(c) The institution shall operate in accordance with its written policies. Copies of policies required by minimum standards shall be made available to facility staff.

(d) The governing body shall reassign or remove from direct child care activity any licensed administrator against whom is returned the following:

(1) an indictment alleging commission of any felony classified as an offense against the person or family, or of public indecency, or of violation of the Texas Controlled Substances Act;

(2) an indictment alleging commission of any misdemeanor classified as an offense against the person or family, or of public decency; or

(3) an official criminal complaint accepted by a district or county attorney alleging commission of a misdemeanor classified as an offense against the person or family, or of public indecency.

(e) Such reassignment or removal shall remain in effect pending resolution of the charges. Notification of such action shall be made to the Licensing Branch within 24 hours or the next working day.

§83.603 (326.91.07.003). Fiscal Accountability.

(a) The institution shall maintain complete financial records. Books shall be audited annually by a certified public accountant. A copy of the accountant's statement of income and disbursements and the opinion letter from the audit report shall accompany the license application for licensed facilities (Texas Human Resources Code chapter 42).

(b) New institutions shall submit a letter from a certified public accountant stating that the bookkeeping system will be set up so that an audit can be made at the end of each fiscal year.

(c) New institutions shall submit a 12-month budget to the Licensing Branch when the signed application is submitted.

(d) New institutions shall have predictable funds sufficient for the first year of operation. They shall have reserve funds, or documentation of available credit, equal to the operating costs for the first three months.

§83.604 (326.91.07.004). Personnel Policies.

(a) Institutions shall have written job descriptions which specify what duties employees are expected to perform. A copy of job descriptions shall be available to employees and to the Licensing Branch.

(b) If volunteers or sponsoring families are used, institutions shall have written policies stating the qualifications for volunteers or sponsoring families and the procedures for selecting these individuals or families. A copy of the policies and procedures shall be available for review by the Licensing Branch.

§83.605 (326.91.07.005). Administrator Qualifications and Responsibilities.

(a) The administrator shall be licensed as provided by the Texas Human Resources Code, chapter 43.

(b) The administrator is responsible for implementing the policies adopted by the governing body, the ongoing operations of the institution, and compliance with the minimum standards for institutions providing basic child care.

(c) If the administrator is involved in activities that cause frequent or extended absences from the institution, an assistant shall be retained to take responsibility for the program and administer the general affairs of the institution. This shall be included in the job descriptions and written plans for staffing. If responsibility for the program of the institution is delegated to an assistant administrator, he or she shall also be licensed.

(d) The licensed administrator shall make available to staff organizational charts and written plans for staffing.

(e) The licensed administrator shall reassign or remove from direct child care activity any employee against whom is returned the following:

(1) an indictment alleging commission of any felony classified as an offense against the person or family, or of public indecency, or of violation of the Texas Controlled Substances Act;

(2) an indictment alleging commission of any misdemeanor classified as an offense against the person or family, or of public indecency; or

(3) an official criminal complaint accepted by a district or county attorney alleging commission of a misdemeanor classified as an offense against the person or family, or of public indecency.

(f) Such reassignment or removal shall remain in effect pending resolution of the charges. Notification of such action shall be made to the Licensing Branch within 24 hours or the next working day.

§83.606 (326.91.07.006). Staffing.

(a) In the administrator's absence, a person or persons shall be responsible for the institution.

(b) The institution shall employ and supervise staff necessary to ensure the health and safety of the children in its care.

(c) The institution shall have staff coverage throughout the 24-hour period.

(1) There shall be at least one child care worker on duty during waking hours for every four children under the age of five, and one child care worker for every eight children five years old and over.

(2) The staff-child ratio applies to the total facility and includes children of staff who live in child care units. Staff shall be available to children in care. Only child care staff or volunteers meeting the same qualifications may be counted in the staff-child ratio.

(3) During sleeping hours, one child care worker shall be in the living unit for every 16 children. However, if night staff is awake, one child care worker in the living unit for every 24 children is required. In addition to required staff, at least one staff person shall be on call in case of an emergency.

§83.607 (326.91.07.007). Qualifications and Responsibilities.

(a) No one may serve as a staff member working with children who has been convicted within the preceding 10 years of any felony classified as an offense against the person or family, or of public indecency, or of violation of the Texas Controlled Substances Act, or of any misdemeanor classified as an offense against the person or family, or of public indecency, unless the director of licensing has ruled that proof of rehabilitation has been established.

(b) The personal qualification of employees shall be verified.

(1) At least three references shall be obtained for each potential employee prior to employment. Information obtained from the references shall be written and filed, whether the interview is conducted in person or by telephone.

(2) Each employee shall submit a statement to the facility providing information concerning any felony or misdemeanor convictions or both within the preceding 10 years and of any pending criminal charges.

(c) Persons whose behavior or health status endangers the children shall not be allowed at the institution.

(d) Staff members shall have an examination for tuberculosis within 12 months prior to employment. Reexamination shall be in accordance with recommendations of local public health authorities or the regional office of the Texas Department of Health. Children of staff members who have contact with other children at the facility shall meet the same requirements as those for children in care.

(e) Child care staff shall be at least 18 years old and be able to read and write.

Cross References: This section cited in 40 TAC §83.625 (relating to Staff Records).

§83.608 (326.91.07.008). Training.

(a) The institution shall provide orientation for all new staff.

(b) All staff working with children shall receive annually at least 15 hours of in-service training related to children's services.

(1) In-service training for staff working with children shall be documented. This shall include the

date, the subject, and the name of the person who conducted the training.

(2) If the policy of the institution permits physical punishment of children in care, in-service training for staff shall include alternatives to physical punishment.

(c) First aid training is required for child care staff who are not licensed/certified health personnel.

(1) First aid training received or scheduled shall be documented for child care staff.

(2) Training shall be conducted by a Red Cross instructor or a licensed/certified health professional.

(3) First aid training shall be updated at least every three years. Certificates or statements of training shall document that training has been updated.

Source: The provisions of this §83.608 adopted to be effective June 29, 1976, 1 TexReg 1580; amended to be effective July 31, 1977, 2 TexReg 2743; amended to be effective February 29, 1980, 5 TexReg 659.

§83.609 (326.91.07.009). Admission Policies.

(a) An institution shall admit only those children for whom it has an operational program and who meet the admission policies.

(1) The institution shall have written admission policies which specify the age, sex, and type of children served. A copy of the admission policies shall be submitted to the Licensing Branch when the signed application is submitted.

(2) If a change in the admission policies is adopted which requires changes in the conditions of the license, the institution shall apply to the department for a new license.

(b) An institution shall not accept more children than the maximum number specified on the license, or children whose age and sex are inconsistent with the condition of the license.

(c) An institution shall not offer, at the same time and in the same facility, two types of care that conflict with the best interests of the children, the use of staff, or the use of the facility. The institution shall document that there is no such conflict.

(d) No child under five years of age shall be cared for in an institution except when it is in the child's best interest and meets his or her particular needs. If a child under five years of age is in care, the intake study and the plan of service shall document why this plan of care was in the child's best interest.

(e) No child shall be denied admission to the institution based on race.

(f) The institution shall not care for a child who has not had a medical examination by a licensed physician within 30 days prior to admission or within 30 days after admission. Children being transferred from an agency who have had a medical examination within the past year are exempt. The medical examination shall be documented in the child's record.

(g) Children shall have had a dental examination by a licensed dentist within six months prior to admission, or arrangements shall be made for one within 30 days after admission. Children being transferred from an agency who have had a dental examination within the past year are exempt. Documentation of the dental exam shall be in the child's medical record.

(h) Children shall be tested for tuberculosis according to the recommendations of the local public health authorities or the regional office of the Texas Department of Health.

§83.610 (326.91.07.010). Intake Study.

(a) Except in an emergency placement, the institution shall not accept a child for care until an intake study has been made and the institution has determined that the placement meets the needs and best interests of the child and his or her family.

(b) The name of the person doing the intake study must be documented. The intake study shall be developed by a person having one of the following qualifications:

(1) A master's degree in social work from an institution accredited by the Council on Social Work Education and a minimum of one year of experience in children's services or family services.

(2) A graduate degree in a behavioral or social science from an accredited college or university and two years of experience in children's or family services.

(3) A bachelor's degree in social work from an accredited college or university and two years of experience in children's or family services.

(4) A bachelor's degree from an accredited college or university and three years of experience in children's or family services.

(5) A bachelor's degree from an accredited college or university and current, direct supervision from a person meeting one of the qualifications listed in paragraphs (1)—(4) of this subsection.

(6) A licensed administrator (Texas Human Resources Code chapter 43).

(c) The intake study shall be filed in the child's record and shall include at least the following information:

(1) a description of family relationships and the family's circumstances that make the placement necessary;

(2) the child's developmental history and medical history;

(3) the parents' or managing conservator's expectations of placement;

(4) the child's understanding of placement;

(5) a description of the child's personality, behavior, and interests;

(6) the child's school history;

(7) history of previous placements;

(8) a statement about the child's legal status;

(9) a statement of the child's needs;

(10) the immediate and long range-goals of the placement; and

(11) name of family member or managing conservator who will be responsible for the relationship with the institution and the child.

(d) The intake process shall include a discussion about placement with the child and his or her parents or managing conservator. This discussion shall be documented.

(e) The institution's policies and procedures shall document the staff responsible for reviewing the intake study and determining which applicants shall be admitted.

(f) At the time of placement, a written agreement shall be made between the institution and the child's parents or managing conservator. A copy of this agreement shall be in the child's record. The agreement shall include:

(1) authorization to care for the child; and

(2) a medical consent form signed by a person authorized to give consent by the Texas Family Code, chapter 35, §35.

(g) Before admission, or at the time of placement, the institution shall provide written material to the child's parents or managing conservator which specifies the following:

(1) rules regarding visits, mail, gifts, and telephone calls;

(2) information on the nature and frequency of reports to the child's parents of managing conservator;

(3) the institution's policy concerning discipline;

(4) the institution's policy or program concerning religious training;

(5) the name of the person or office that parents or managing conservators can contact if they feel their child's rights have been violated;

(6) information regarding trips; and

(7) if the institution has a school program, information concerning its accreditation, approval, or lack thereof by the Texas Education Agency.

(h) The institutions shall provide orientation for new children.

§83.611 (326.91.07.011). Emergency Placement.

When an emergency placement has been made, an intake study shall be completed within 30 days.

(1) The institution shall document the conditions that make emergency placement necessary.

(2) The institution shall document that the intake study was initiated within five days of admission.

§83.612 (326.91.07.012). Placement in Foster or Adoptive Homes.

An institution shall be licensed for child-placing activity before it places individuals in care into foster or adoptive homes or another institution (Texas Human Resources Code chapter 42).

§83.613 (326.91.07.013). Plan of Service.

(a) Within 30 days of admission, an initial plan of service shall be developed by a staff person at the institution who meets the same qualifications as the person making the intake study. The plan of service shall be developed after conferring with the child and the child's parents or managing conservator. The plan shall be filed in the child's case record, with copies or a summary given to the child's parents or managing conservator.

(1) The plan of service shall specify the child's needs and the way these needs shall be met.

(2) The plan of service shall include the objectives of placement and the estimated length of stay.

(3) The plan of service shall be shared with staff working with the child.

(b) There shall be a conference every six months for the purpose of reviewing and updating the plan. The conference shall include a representative of the institution who meets the same qualifications as the person doing the intake study, the child's parents or managing conservator, and the child. Results of the conference shall be filed in the child's record.

(1) The child's parents or managing conservator shall be notified of the conference in advance.

Documentation of notification of the child's parents or managing conservator shall be included in the child's record.

(2) The updated plan shall note achieved or changed objectives. A copy of the summary shall be given to the child's parents or managing conservator.

(3) The names of persons participating in the conference shall be listed. If those listed in this section did not participate, a copy of the updated plan shall be sent for their response.

(c) The institution shall obtain or provide professional consultation and treatment for children with developmental disabilities and/or problems of adjustment in the social, home, and/or school environment. Any record of specialized testing or treatment shall be documented in the child's record.

(d) Institutions providing care for children and adults are required to meet the standards in §83.628 (326.91.07.031) of this title (relating to Providing Care for Children and Adults).

Source: The provisions of this §83.613 adopted to be effective June 29, 1976, 1 TexReg 1580; amended to be effective September 21, 1977, 2 TexReg 3458; amended to be effective February 29, 1980, 5 TexReg 659.

§83.614 (326.91.07.014). Daily Care.

(a) The daily schedule shall be developed to meet children's needs.

(b) Child care staff shall be responsible for keeping a record of significant occurrences for each child. This record shall be available for review by the Licensing Branch.

(c) The institution shall see that each child is supplied with personal clothing suitable to the child's age

and size. It shall be comparable to the clothing of other children in the community.

(d) Children shall be given training in personal care, hygiene, and grooming. Each child shall be supplied with personal care, hygiene, and grooming equipment.

(e) The institution shall make available supervised indoor and outdoor recreation and equipment so that every child may participate.

(f) The institution shall encourage and arrange for children to participate in community functions and recreational activities. Children shall be encouraged to form friendships with persons outside the institution.

§83.615 (326.91.07.015). Money.

(a) The institution shall provide children with guidance in money management.

(b) Money earned by a child or received as a gift or allowance shall be his or her personal property. A child's money shall be accounted for separately from the institution's funds.

(c) A child shall not be required to use earned money to pay for room and board, unless it is a part of the treatment plan and approved by the parent or managing conservator and the director of the program.

§83.616 (326.91.07.017). Education, Work, and Training.

(a) The institution shall arrange an education appropriate for each child.

(b) The institution shall provide for the social and educational needs of the children.

(c) The institution shall distinguish between tasks which children are expected to perform as part of living together, jobs to earn spending money, and jobs performed for vocational training.

§83.617 (326.91.07.018). Children's Rights.

(a) The staff of the institution shall allow privacy for each child.

(b) Each child shall have access to a quiet area where he or she can withdraw from the group when appropriate.

(c) Contacts between the child and his or her family shall be allowed while the child is in care, unless the rights of the parents have been terminated by court order or family contact is not in the child's best interest. The frequency of contact shall be based on the needs of the child and shall be determined with the participation of his or her family or managing conservator and institutional staff. Any limitations shall be filed in the child's case record.

(1) Children shall be allowed to send and receive mail and have telephone conversations with their family members or managing conservator, unless the best interests of the child or a court order necessitates restrictions.

(2) When contact with the family is requested by either the child or his or her family, and the institution determines contact is not in the child's best interest, the restrictions from communication shall be determined by a psychiatrist, licensed psychologist, social worker, or licensed administrator. Reasons for the restrictions shall be documented in the child's record. If contact continues to be requested and continued restrictions are necessary, these restrictions shall be evaluated monthly by one of the persons mentioned in this paragraph and reasons for the continued restrictions documented in the child's record.

(3) If limits are put on communication or visits for practical reasons (such as expense), these shall be determined with the participation of the child and

his or her family or managing conservator. These limitations shall be filed in the child's record.

(d) The institution shall have clearly written policies regarding visits, gifts, mail, and telephone calls between the child and his or her family or managing conservator. These policies shall be available for review by the Licensing Branch.

(e) A child shall be allowed to bring personal possessions to the institution and may acquire personal possessions. If limits are put on the kind of possessions a child may or may not receive, these shall be discussed with the child and his or her family or managing conservator.

(f) The institution shall not place a child in a position of having to acknowledge his or her dependency, destitution, or neglect. The institution shall not require the child to make statements regarding his or her background or dependence on the institution.

(g) The institution shall not require a child to make public statements to acknowledge gratitude to the institution.

(h) Children in care shall not be required to perform at public gatherings.

(i) Pictures, reports, or identification that humiliate, exploit, or invade the privacy of a child or his or her family or managing conservator shall not be made public. The institution shall not use reports or pictures from which children can be identified without written consent from the child and the parents or managing conservator.

(j) There shall be no racial discrimination by the child-caring institution.

(k) The opinions and recommendations of the children in care shall be considered in the development and evaluation of the program and activities. The procedure for this shall be documented. A copy of the procedure shall be available for review by the Licensing Branch.

(l) Children in care shall not act as or be employed as staff.

(m) The institution shall have written policies for the discipline of children in care. Copies of the discipline policies shall be provided to staff. Copies of the institution's discipline policy shall be submitted to the Licensing Branch with each application for a license.

(1) Only adult staff members shall discipline children.

(2) Children shall not be subjected to cruel, harsh, unusual, or unnecessary punishment.

(3) The reason for the physical punishment and for the imposition of restrictions to the facility that exceed 24 hours shall be made clear to the child and shall be recorded. A complete description of the physical punishment administered shall be recorded.

(4) Children shall not be subjected to verbal remarks that belittle or ridicule them or their families.

(5) Children shall not be denied food, mail, or visits with their families as punishment.

(6) Discipline shall fit the needs of the child.

(7) No child of any age shall ever be shaken.

(8) If the policy of the institution permits spanking children less than five years old, spanking shall only be administered with an open hand on a child's buttocks or hands.

(9) If physical punishment is administered at the institution, it shall be administered by a staff member and witnessed by an additional staff member. The name and position of these staff members shall be recorded in the child's record.

(n) Physical holding as a form of restraint shall be used only to protect the child from injury to self or others. The use of physical holding and the length of time used shall be recorded in the child's case record. Mechanical restraints shall not be used.

(o) Children in care shall not be placed in a locked room.

Source: The provisions of this §83.617 adopted to be effective June 29, 1976, 1 TexReg 1580; amended to be effective July 31, 1977, 2 TexReg 2743; amended to be effective February 29, 1980, 5 TexReg 659.

§83.618 (326.91.07.019). Medical and Dental Care.

(a) The institution shall have written policies and procedures for obtaining diagnosis and treatment of medical and dental problems.

(1) Copies of the policies and procedures shall be available for review by the Licensing Branch.

(2) The institution shall make known to all staff members the policies and procedures to be followed in an emergency.

(b) All children shall be examined annually by a licensed physician. Documentation of the examination signed by a licensed physician shall be filed in the child's medical record.

(c) Provisions for medical isolation shall be available.

(d) All children shall have a dental examination by a licensed dentist or a dental hygienist working under the supervision of a licensed dentist at least once a year. Documentation of the examination shall be filed in the child's medical record.

(e) Provisions shall be made for emergency medical and dental care.

(f) The institution shall comply with laws, rules, and regulations regarding immunization of children

(Texas Human Resources Code chapter 42). Current immunization records shall be maintained for each child at the facility. Children's immunization records shall include the birthdate, the immunization status, the number of doses, and the dates each immunization was received. A machine or handwritten copy of the immunization record is acceptable. Handwritten copies shall bear the signature of the responsible staff member copying the information. Compliance with this standard shall be measured by the presence of one or more of the following in each child's record:

(1) A written and dated record that the child has been immunized against diphtheria, tetanus, pertussis, polio, measles, mumps, and rubella. This record shall have a rubber stamp or signature of the physician or health personnel and shall specify the type, number of doses, and the dates given as required by law.

(2) A written and dated statement from a licensed physician or other authorized health personnel that immunizations against at least one of the diseases mentioned in paragraph (1) of this subsection have begun. The immunization cycle shall be completed as soon as is medically feasible. A current immunization record shall be on file at the institution.

(3) A certificate signed by a physician, duly registered and licensed under the Medical Practice Act, stating the physician's opinion that the required immunization would be injurious to the health and well-being of the child or any member of his or her family or household.

(4) An affidavit signed by the parent or managing conservator of the child, stating that the vacci-

nation or immunization conflicts with the tenets and practice of a recognized church or religious denomination of which the child is an adherent or member.

(5) A written and dated statement for a child enrolled in a public school program, signed by the parents or managing conservator, stating that the child's immunization record is on file at the school the child attends and that all immunizations are current. The name of the school shall be included on the statement.

(g) The institution shall comply with laws, rules, and regulations regarding acquisition, storage, and administration of medications. (See §83.1101 (326.91.12.001) of this title (relating to Procedural Guide for Pharmaceutical Services in the Child-Caring Institution).

(h) Medication records shall include the medication given, the time, the dosage, and the name of the person administering the medication.

(1) All medication shall be given by an adult staff member, except when a child is participating in a medically approved self-medication program. Medication shall be given according to the instruction on the label.

(2) See §83.1101 (326.91.12.001) of this title (relating to Procedural Guide for Pharmaceutical Services in the Child-Caring Institution).

(i) Current medical and dental records shall be maintained for each child. The record shall include a record of each visit to a physician or dentist and recommended treatment. Treatment shall be provided as indicated.

§83.619 (326.91.07.020). Nutrition.

Children shall be provided food of adequate quality and in sufficient quantity to supply the nutrients needed for growth and development.

(1) "Food for Fitness — A Daily Food Guide," developed by the United States Department of Agriculture, shall be used as a basis for meeting these standards. (See §83.9801 (326.91.99.600) of this title (relating to Daily Food Guide).)

(2) Children shall have a minimum of three meals daily and snacks.

(3) Menus, as served, shall be retained on file for one month after use.

(4) All milk products and milk shall be Grade A pasteurized or from sources approved by the Texas Department of Health.

(5) No more than 14 hours shall pass between the last meal or snack of one day and the serving of the first meal of the following day.

§83.620 (326.91.07.021). Discharge.

(a) The following persons shall be involved in planning the discharge of a child from the institution:

(1) the child;

(2) the child's parents or managing conservator; and

(3) institution staff.

(b) The discharge plan for the child shall be recorded in his or her record. The circumstances surrounding the discharge shall be documented in the case record. The name, address, and relationship of the person to whom the child is discharged shall be recorded.

(c) In the event of an emergency discharge for which the institution is unable to plan with the persons listed in subsection (a) of this section, the institution shall document circumstances surrounding the emergency discharge in the child's record.

(d) The institution shall not discharge a child to anyone other than the parent or managing conservator, except on written authorization from the parent or managing conservator.

§83.621 (326.91.07.022). Health and Safety.

(a) Documentation of current and approved fire, health, and safety inspections shall be on file at the institution. Copies of the inspection reports shall be submitted to the Licensing Branch when the signed application for licensure is submitted and annually thereafter. The required annual inspections are as follows:

(1) Fire inspections, which shall meet requirements set by the local fire marshal. In areas where there is no certified fire inspector, the state fire marshal shall be requested to make the inspection.

(2) Health inspections, which shall meet regulations set by the local health ordinances and the Texas Department of Health.

(3) Gas pipes shall be pressure tested by the local gas company or a licensed plumber, and documentation provided that there are no leaks.

(4) Liquefied petroleum gas systems shall be inspected by the Liquefied Petroleum Gas Division of the Texas Railroad Commission.

(b) There shall be written plans and procedures for meeting disasters and emergencies, such as fires or severe weather. Staff members shall know the procedures for meeting disasters and emergencies.

(c) An outdoor swimming pool shall have a fence. Entrances and exits to outdoor and indoor pools shall be locked when pools are not in use. Machinery rooms shall be locked to prevent children from entering.

(d) A certified lifeguard shall be on duty when the facility's swimming area is in use. Certification shall be documented in the personnel records.

§83.622 (326.91.07.023). Environment.

(a) Building and grounds shall be maintained, repaired, and cleaned so that they are not hazardous to health and safety.

(1) Outdoor areas shall be well drained.

(2) Windows and doors used for ventilation shall be screened.

(3) Equipment and furniture shall be safe and sturdy.

(4) Institutions shall ensure that children in care are provided adequate protection from flammable and poisonous substances.

(5) Explosive materials, firearms, and projectiles such as darts, arrows, and BB's shall be stored out of children's reach.

(b) Animals on the premises shall be vaccinated and treated as recommended by a licensed veterinarian to protect the health of the children. Documentation of vaccinations and treatment shall be on file at the institution.

(c) Institutions shall take measures to keep the facility free of rodents, insects, and stray animals.

(d) There shall be indoor areas where children can gather. There shall be a minimum area of 40 square feet per child. Bedrooms, halls, kitchens, and any rooms not available to children shall not be included in the minimum space requirement.

(e) A sleeping room shall contain at least 60 square feet per occupant. Bedrooms for single occupants shall have at least 90 square feet of floor space.

(f) Sketches of floor plans showing dimensions and purposes of all rooms shall be submitted to the Licensing Branch when the signed application is submitted.

(g) Furniture shall not block exit ways.

(h) Each child shall have his or her own bedstead and mattress. Beds shall be kept clean and comfortable. Mattresses shall have covers or protectors.

(i) There shall be personal storage space for each child's clothing and possessions which is accessible to the child.

(j) No child over six years of age shall share a bedroom with a person of the opposite sex.

(k) There shall be one lavatory, one tub or shower with hot and cold running water, and one toilet for every eight children.

(1) Separate toilet and bath facilities shall be provided for boys and girls over six years of age.

(2) Bathrooms shall be located near the sleeping area.

(3) Bathrooms shall be thoroughly cleaned daily.

§83.623 (326.91.07.024). Food Preparation, Storage, and Equipment.

(a) All food and drink shall be of safe quality and prepared and served in a sanitary manner.

(1) Food preparation, dining and storage areas, equipment, and furniture shall be maintained in a state of cleanliness and good repair.

(2) All food items shall be stored off the floor. All food items except those which are to be washed and

peeled shall be stored in covered containers that are insect- and rodent-proof or refrigerated.

(3) Animals shall not be permitted in food storage, preparation, and dining areas.

(4) One-time-use paper and plastic dishes, utensils, and containers shall not be reused.

(b) Cleaning supplies shall be clearly marked and kept separate from food.

§83.624 (326.91.07.025). Children's Records.

(a) Accurate and current records shall be maintained for each child in care. In addition to other required documentation, each child's record must include: the child's name, date of birth, place of birth, sex, religion (if known), race; names and addresses of parents, brothers, and sisters; names and addresses of other persons who have a significant relationship with the child; date of admission, birth certificate or other documentation which establishes identity, if available (records without these documents shall reflect correspondence generated at least every three months to obtain such); and date of discharge.

(b) The institution shall ensure that case records are kept confidential and inaccessible to unauthorized persons.

(1) Information in case records shall be disclosed only for direct and authorized services to the child or the administration of the institution.

(2) These records shall be at the institution and available to the department for review.

§83.625 (326.91.07.026). Staff Records.

Personnel records shall be maintained for each employee of the institution. These records shall contain information on the following:

(1) qualifications for the position;

(2) tuberculosis test reports for all staff as required by §83.607(d) (326.91.07.007(d)) of this title (relating to Qualifications and Responsibilities);

(3) date, name of contact, and information received from preemployment references;

(4) conviction record statement;

(5) date of employment;

(6) date and reason for separation;. and

(7) forwarding address of separated employees.

§83.626 (326.91.07.027). Reports and Records.

(a) Any serious incident involving a child shall be reported immediately to the parents or managing conservator. Documentation of notification to the child's parents or managing conservator shall be included in the child's record.

(b) The institution shall complete written incident reports concerning serious occurrences involving staff or children. Each report shall include the date and time of occurrence, the staff member or children involved, the nature of the incident, and the circumstances surrounding it. A copy of the report shall be filed at the institution and shall be available for review by the staff of the Licensing Branch.

(c) The following types of serious occurrences shall be reported to the Licensing Branch within 24 hours or the next working day: suicide attempts, incidents of cruel or abusive treatment, incidents which critically injure or permanently disable a child, and death of a child.

(d) Absences without permission shall be reported to the parents or managing conservator when it is determined that the child is a runaway. Documentation of no-

tification to the child's parents or managing conservator shall be included in the child's record.

(e) Disasters or emergency situations which require closure of the living unit, such as fires or severe weather, shall be reported to the Licensing Branch of the Department within 24 hours or the next working day.

(f) The administrator of the child-caring institution shall submit reports to the Licensing Branch of the department concerning:

(1) any change in administrator; and

(2) any impending change that would necessitate a change in the conditions of the license.

(g) The institution shall allow the department to visit and inspect the institution at all reasonable times (Texas Human Resources Code chapter 42).

(h) The institution's records shall be available at the facility and open for review by the Licensing Branch.

(j) The license shall be displayed at the institution (Texas Human Resources Code chapter 42).

§83.627 (326.91.07.029). Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

Child care facility — A facility providing care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit, and whether or not the facility makes a charge for the service offered by it.

Child care unit — A building or part of a building where a group of children live.

Dentist — Refers only to a licensed dentist.

Emergency placement —An emergency exists if a child is in danger; a child is a danger to others; or a child is abandoned and does not have a place to stay.

Hospital — Refers only to a licensed or accredited facility.

Institution providing basic child care — A child care facility which provides care for more than 12 children for 24 hours a day. Basic child care does not include a 24-hour-a-day specialized program such as that offered by an emergency shelter, therapeutic camp, residential treatment center, halfway house, or institution serving mentally retarded children.

Physician —Refers only to a physician duly registered and licensed under the Medical Practice Act or practicing on a U.S. military installation.

Psychologist — Psychologist as defined by the Psychologist's Certification and Licensing Act.

Supervise — To be aware of and responsible for the ongoing activity of a child. Supervision requires the presence of a staff member who has knowledge of program and children's needs, and who is accountable for service delivery.

Trip — An excursion that is overnight or longer.

§83.628 (326.91.07.031). Providing Care for Children and Adults.

(a) Institutions providing care for children and adults shall ensure that the required staff-child ratio is maintained for the children in care. This shall be accomplished by one of two alternatives:

(1) Specific staff shall be assigned to work exclusively with the children in care. Job descriptions and staffing assignments shall show no conflicts in assignments to child care staff.

(2) If staff assignments are such that staff must be responsible for children and adults, then the re-

quired staff-child ratio shall be maintained for all the residents in care.

(b) Adult residents cannot be counted as staff in the staff-child ratio.

(c) Institutions providing care for children and adults shall ensure that the required 40 square feet of indoor area per child is maintained for the children in care. This shall be accomplished by one of two alternatives:

(1) a specific indoor area shall be assigned to be used exclusively by the children in care; or

(2) if children and adults must share the living area, then the required minimum square footage shall be maintained for all the residents in care.

(d) Institutions providing care for children and adults shall ensure that the required 60 square feet of bedroom space per occupant is maintained for the children in care. This shall be accomplished by one of two alternatives:

(1) specific bedroom areas shall be assigned to be used exclusively by the children in care; or

(2) if bedroom areas are shared by children and adults, then the minimum square footage shall be maintained for all the residents in care.

(e) Any serious occurrences involving children or adult residents shall be reported to the Licensing Division. A serious accident, suicide attempt, incident of cruel or abusive treatment, dangerous situation, or death shall be reported to the Licensing Division within 24 hours or the next working day.

(f) If adults are allowed responsibility for their own medication, the institution shall establish safeguards to prevent children in care from having access to the medications..

(g) Adults in care shall have a tuberculosis test within 12 months prior to admission. A report of the skin test, with follow-up or a negative chest x-ray if appropriate, is mandatory. Any additional testing shall be based on recommendations of the Texas Department of Health or local public health authorities.

Source: The provisions of this §83.628 adopted to be effective June 29, 1976, 1 TexReg 1580; amended to be effective September 21, 1977, 2 TexReg 3458; amended to be effective February 29, 1980, 5 TexReg 659.

Cross References: This section cited in 40 TAC §83.613 (relating to Plan of Service).

SUPPLEMENTS TO THE MINIMUM STANDARDS

OUTLINE FOR PLAN OF OPERATION

The following questions may be used as an outline for completing the Plan of Operation:

1. **WHY** does the program exist? List the stated purposes and goals of the program, quoting from the charter, constitution or other official declaration of purposes.

2. **WHAT** are the specific services provided to accomplish the stated goals and purposes? What does the program offer to the persons whom it serves? What procedures have been formulated to provide parents and managing conservators of the children in care an opportunity for consultation in formulation of education and therapeutic programs.

3. **WHO** is eligible to receive these services? List eligibility requirements for individuals served. Note that provisions must be made to ensure that racial discrimination by an institution is prohibited.

4. **HOW** are these services provided? What are the staff resources—numbers and qualifications of staff? What are the community resources used? Are services provided by the staff of the organization or purchased or donated by others? Describe job responsibilities of staff. How is the program financed? Describe sources of financial support. Evaluate operating budget.

5. **WHERE** are the services provided? Describe the location and physical facilities, such as buildings and other property used. Indicate geographic area served.

6. **WHEN** are services provided? Describe typical schedule of activities, showing time-table for activities or typical day in the program.

DAILY FOOD GUIDE

This information provides a detailed interpretation of the nutrition standard of the **Texas Minimum Standards for Child-Caring Institutions.**

It is based on **Food for Fitness—A Daily Food Guide** prepared by the Agricultural Research Service and published as Leaflet No. 424, U.S. Department of Agriculture, Superintendent of Documents, Washington, D.C. It has been reprinted and is available from the Texas State Department of Health, 410 East 5th, Austin, Texas 78701.

In the **Daily Food Guide** which follows, foods within each group have similar but not identical food value. Each day choose at least the minimum number of servings from each of the broad **Food Groups: Meat Group, Bread—Cereal Group, Vegetable—Fruit Group, Milk Group and Other Foods.** Servings may differ—small for young children, large (or seconds) for very active adults or teen-agers.

MILK GROUP

Each day serve the specified amounts of fresh milk or combinations of fresh milk and milk products having a total calcium value equal to the specified amounts of fresh milk.

Specified Amounts

2 to 3 cups of fresh milk for children under 9 years of age
3 or more cups of fresh milk for children 9-12 years of age
4 or more cups of fresh milk for teen-agers
2 or more cups of fresh milk for adults

Amounts	Milk Products
Any one of these is equal to the calcium value of ½ cup fresh milk	¼ cup undiluted evaporated milk 2 tablespoons nonfat dry milk ½ cup custard or milk pudding ½ cup cream soup made with milk ½ cup milk used on cereal
Any one of these is equal to the calcium value of ¼ cup fresh milk	½ cup ice cream 1 thin slice cheddar cheese* (1 oz.) ½ cup cottage cheese*

* If cheese is counted as milk, it should not be counted as meat.

OTHER FOODS

Serve butter, margarine, fats, oils, sugar, or unenriched refined grain products as needed to complete meals and to provide additional food energy and other food values.

Bacon and cream cheese are counted as fats because they contain very little protein. Either one tablespoon of cream cheese or one slice of crisp bacon is equivalent to one teaspoon of margarine or butter.

MEAT GROUP

Each day serve four ounces of cooked, lean meat, or a combination of meats and meat alternates having a protein value equal to four ounces of cooked lean meat.

Amounts	Meats
Four ounces of raw lean meat are to be counted as three ounces of cooked meat	Lean beef Veal Lamb Pork Variety meats: heart, liver, kidney
Either of these is equal in protein value to one ounce cooked lean meat*	Poultry, example: 1 small drumstick Processed meats, example: 1 all-meat frankfurter
	Meat Alternates
Any one of these is equal in protein value to one ounce cooked lean meat	1 egg 2 tablespoons peanut butter ½ cup, when cooked, of dried peas, lentils, beans, textured vegetable protein 1 thin slice cheddar cheese** (1 oz.) ½ cup cottage cheese**

* The Department considers that one ounce of cooked fish is equal in protein value to one ounce of cooked lean meat.

** If cheese is counted as meat, it should not be counted as milk.

BREAD—CEREAL GROUP

Each day provide four or more servings of breads and cereals which are whole grain, enriched or restored.

Count any one of these as one serving	1 slice bread 1 roll, muffin or biscuit 5 saltine crackers 2 graham crackers 1 tortilla 1 ounce ready to eat cereal ½ to ¾ cup cooked oatmeal, cornmeal, grits, rice, macaroni, noodles or spaghetti 2-3 enriched cookies

VEGETABLE—FRUIT GROUP

Each day provide four or more servings of vegetables and fruits including one good source or two fair sources of Vitamin C.

At least one serving every other day should be a good source of Vitamin A.

The remaining servings each day may be any vegetable or fruit including those valuable for Vitamins C and A.

Amounts	Good Sources of Vitamin C:
Count any one of these as one serving of Vitamin C	1 medium orange ½ grapefruit ½ cup orange juice, grapefruit or blended citrus juices** ½ cantaloupe* ¾ cup strawberries ½ cup cooked broccoli* or brussel sprouts*
	Fair Sources of Vitamin C:
Count any two of these as one serving of Vitamin C	1 medium tomato raw* or ½ cup cooked*, or ½ cup juice* 1 tangerine or ½ cup tangerine juice
collards* or other leafy greens*	½ cup cauliflower, raw cabbage, cooked rutabaga, turnip greens*, collards* or other leafy greens* 1 medium potato, sweet* or white ½ medium green pepper
	Good Sources of Vitamin A:
Count any one of these as one serving of Vitamin A	½ cup sweet potatoes, carrots, pumpkin or winter squash ½ cup collards, brocolli, turnip greens, or other dark leafy greens 5 apricot halves ¼ medium cantaloupe
	Other Vegetables and Fruits
Count any one of these as one serving	Other vegetables not listed above 1 medium apple 1 banana 1 peach, etc. ½ cup other fruit or vegetable

* If the food chosen for Vitamin C is also a good source of Vitamin A, the additional serving of Vitamin A food may be omitted.

** Fruit juice fortified with Vitamin C may be substituted for fruit juice naturally high in Vitamin C. Fruit flavored drinks shall not be substituted for fruit juice or fruit.

PROCEDURAL GUIDE FOR PHARMACEUTICAL SERVICES IN THE CHILD-CARING INSTITUTION

A. A pharmacist consultant is recommended for a Child-Caring Institution to assist in the development of pharmacy services.

B. Definitions:

1. Non-legend — a drug which does not require a prescription from a prescribing practitioner for purchase. A non-legend drug may also be referred to as an OTC (Over the Counter) drug. Although a prescription may be written for a non-legend drug, it does not make the drug legend.

2. Legend — a drug which bears the following inscription on the label of its container: "Federal Law prohibits dispensing without a prescription." A prescription from a licensed practitioner is required for purchase of a legend drug.

C. Physical Facilities:

1. It is necessary that the door leading to the medication room or cabinet medication storage area be equipped with a locking device.

2. The medication room or cabinet medication storage area must have a separate cabinet, box, or drawer to store poisons and drugs "for external use only."

3. The facility must have a method of storing medications requiring refrigeration.

4. Any suitable location within the medication room or cabinet medication storage area may be used for storage of non-legend drugs.

5. A medication cabinet containing a locking device and located within the locked drug room may contain separate boxes, drawers, or sections for poisons, medications for "external use only", and medications covered by Section II of the Controlled Substances Act. In this case it is not necessary for each of the boxes, drawers, or sections to have a separate locking device.

6. The facility should have emergency drugs and equipment developed by the professional medical staff. (First Aid)

7. The facility should have a medication station which contains forms suitable for maintaining adequate records of all medications administered to pateints by the authorized individuals. (Examples of these forms are shown in Exhibit 1.)

8. The medication area must be clean and orderly.

D. Medication Labels:

1. Must be legible, unsoiled and complete.

2. Must contain the following information:

a. Patient's full name

b. Prescribing physician's name

c. Pharmacy prescription file number

d. Name and strength of the drug

e. Date of issue (date the prescription was filled or refilled)

f. Expiration date of all time-dated drugs

g. Name, address, and telephone number of pharmacy issuing the drug

h. Warning labels as applicable (Examples: "refrigerate, external use only, not for I.V. use.")

3. Labeling errors must be reported to the issuing pharmacist immediately by the nurse or authorized individual.

E. Storage of Medication:

1. Medication must be stored in the original containers as received from the pharmacy.

2. Preparation for the administration of a single dose of medication must be done immediately prior to the administration of the medication, i.e., preparing individual doses of medication for the next day's use is not allowed.

3. Storage of drugs must be in their required place, i.e., drugs requiring refrigeration must be stored within the refrigerator.

4. Transferring between containers of medication is illegal, i.e., pouring medication from a large container to a small one. Transferring medication from one patient's container to another patient's container (borrowing) is also illegal.

5. Discontinued medications are to be turned in to the administrator's office within 90 days of the date of discontinuance to be disposed of in accordance with Federal and State laws.

6. Medications which have passed an expiration date are to be turned in to the administrator's office immediately to be disposed of in accordance with Federal and State laws.

Proper records of disposition of these medications must be kept.

7. Medications of deceased patients are to be turned in to the administrator's office immediately to be disposed of in accordance with Federal and State laws. Proper records of the disposition of these medications are to be kept. Should there be a delay because of charge personnel (director of nurses and/or medication nurse) not being available for immediate removal of medication, documentation of the interim period should be made.

8. The administrator is responsible for inventory and storage of discontinued medications, medications which have passed an expiration date, and medications of deceased patients. When the home has an accumulation of such medications, these medications shall be disposed of in accordance with Federal and State laws.

F. Order Procedure for Medications:

1. If a specific amount of medication or the time for discontinuance is not specified, the medication will not be renewed except on the orders of the treating physician. A "prn" refill order or an indefinite order must be reviewed regularly every six months.

2. The nurse or the authorized individual and the patient's physician will review each patient's medication as part of the treatment plan. This review will take place as deemed appropriate by the nurse or authorized individual, approximately every 30 days.

G. Administration of Medication:

1. The nursing station must have readily available items necessary for the proper administration of the medication.

2. In the interest of patient care, all medications should be administered by authorized personnel only. It must be the duty of the person responsible

for administering the medication to ascertain that the medication is, in fact, taken by the patient.

3. Each dose administered should be properly recorded and initialed in the clinical record by the individual administering the dose. (For examples of such records, see Exhibit 1.)

4. Medications prescribed for one patient must not be administered to any other patient. (Borrowing is prohibited.)

5. Medication errors and drug reactions:

a. Such errors and reactions must be immediately reported to the patient's physician and to the consultant or issuing pharmacist.

b. Any entry of the incident and the subsequent reporting thereof should be made in the patient's record.

H. All legend pharmaceuticals are to be prescribed by the treating physician.

I. Sample medications are not allowed unless properly labeled and administered.

J. An "external use only" drug is any drug that if administered to a patient either by mouth or by injection may cause harm or death to the patient. Ear drops, nose drops, ointments, opthalmic preparations, lotions, suppositories, etc., are all classified as "external use only" drugs.

Exhibit 1

Patient's Name Rx No. Name and strength of drug Date filled Physician's Name Directions: Expiration date	PHARMACEUTICAL SERVICES Individual Patient's record of Drugs FOR _____ (NAME) PHARMACY Name Address Telephone No.	AMOUNT RECEIVED

Remarks:

Signature of Person Administering Medication	Date	Time	Amount Given	Amount Remaining

CHILD-CARE FACILITY IMMUNIZATION REQUIREMENTS EFFECTIVE 9/1/79

Age Group	Immunization Required
Under 2 mos.	No immunizations required
2 mos. to 4 mos.	1 dose of oral polio vaccine (OPV). 1 dose of diphtheria-tetanus-pertussis (DTP) vaccine.
4 mos. to 6 mos.	2 doses of OPV. 2 doses of DTP vaccine.
6 mos. to 18 mos.	2 doses of OPV. 3 doses of DTP vaccine.
18 mos. to 5 yrs.	3 doses each of OPV and DTP vaccine. 1 dose each of measles(1), rubella(2), and mumps(3) vaccines.
5 yrs. and older	3 doses each of OPV(4) and DTP(5) vaccine. 1 dose each of measles(1), rubella(2), and mumps(3) vaccines.

NOTES:

1. As a part of the child's immunization record, a written physician-verified history of measles illness is acceptable in lieu of vaccine. Effective September 1, 1979, children through age twelve years are required to have received measles vaccine since the first birthday or provide a written physician verified history of measles illness. On the first of September of each following year, children one year older must also meet these requirements, and by September 1, 1985, all children through 18 years of age will be included. See the table below.

Measles Vaccine Requirements By Effective Dates
For Children in Child-Care Facilities

Effective Dates	Ages in Years*
September 1, 1979	Thru 12
September 1, 1980	Thru 13
September 1, 1981	Thru 14
September 1, 1982	Thru 15
September 1, 1983	Thru 16
September 1, 1984	Thru 17
September 1, 1985	Thru 18

*Ages of children in child-care facilities on the effective date.

2. Rubella vaccine is not required after the twelfth birthday. A history of rubella illness is not acceptable.

3. As a part of the child's immunization record, a written physician-verified history of mumps illness is acceptable in lieu of vaccine. Effective September 1, 1979, children less than eight years of age are required to have received mumps vaccine or

provide a written physician-verified history of mumps illness. On the first of September each following year, children one year older must also meet this requirement. By September 1, 1990, all children through 18 years of age will be included. See the table below.

Mumps Vaccine Requirements By Effective Dates for
Children 18 Months Through 18 Years of Age
In Child-Care Facilities

Effective Dates	Ages in Years*
September 1, 1979	Thru 7
September 1, 1980	Thru 8
September 1, 1981	Thru 9
September 1, 1982	Thru 10
September 1, 1983	Thru 11
September 1, 1984	Thru 12
September 1, 1985	Thru 13
September 1, 1986	Thru 14
September 1, 1987	Thru 15
September 1, 1988	Thru 16
September 1, 1989	Thru 17
September 1, 1990	Thru 18

*Ages of children in child-care facilities on the effective date.

4. At least three doses of oral polio vaccine (OPV) are required, provided at least one dose has been received on or after the fourth birthday. A dose of OPV given during the calendar month prior to the fourth birthday is also acceptable. No further doses of OPV are required.

Some children or students may be enrolled who have received inactivated polio vaccine (IPV). These students are in full compliance when an initial series of four doses are completed and a booster dose within three years of the fourth dose has been received. A booster dose is required every three years thereafter. If the child, upon medical advice, starts receiving OPV, then the total requirement for OPV must be met.

5. At least three doses of DTP and/or Td vaccine are required, provided at least one dose has been received on or after the fourth birthday. A dose of DTP or Td given during the calendar month prior to the fourth birthday is also acceptable.

In addition to the minimum of three DTP or Td doses with one dose since the fourth birthday, children twelve years of age and older must have a last dose within the past ten years. (A Td booster is required ten years after the administration of the immunization that meets the requirements for the "dose since the fourth birthday." Example: If the last dose of DTP was received at age five, the ten-year Td booster is due at age 15.)

6. An **annual report of the immunization status** by age group of all children shall be submitted on the request of the Texas Department of Health.

ALTERNATIVES TO PHYSICAL PUNISHMENT

1. Children should have good behavior recognized and encouraged.

2. Children should be taught by example through use of fair and consistent rules. The atmosphere should be relaxed. Discipline should be relevant to the behavior involved.

3. Children should be supervised by persons showing an attitude of understanding and firmness.

4. Children should be given clear directions and provided guidance on the child's level of understanding.

5. Children should be held firmly if their behavior is such as to harm themselves or others.

6. Children should be redirected by stating alternatives when their behavior is unacceptable. (Example: "Blocks are for building, not throwing — try throwing this ball.")

7. Children should be helped to understand why their conduct is unacceptable and what is acceptable in a given situation.

ADDITIONAL MINIMUM STANDARDS FOR INSTITUTIONS PROVIDING BASIC CARE FOR CHILDREN AND ADULTS

1. Institutions providing care for children and adults shall ensure that the required staff-child ratio is maintained for the children in care. This shall be accomplished by one of two alternatives.

a. Specific staff shall be assigned to work exclusively with the children in care. Job descriptions and staffing assignments shall show no conflicts in assignments to child care staff.

or

b. If staff assignments are such that staff must be responsible for children and adults, then the re-

quired staff-child ratio shall be maintained for all the residents in care.

2. Adult residents cannot be counted as staff in the staff-child ratio.

3. Institutions providing care for children and adults shall ensure that the required 40 square feet of indoor area per child is maintained for the children in care. This shall be accomplished by one of two alternatives:

a. A specific indoor area shall be assigned to be used exclusively by the children in care.

or

b. If children and adults must share the living area, then the required minimum square footage shall be maintained for all the residents in care.

4. Institutions providing care for children and adults shall ensure that the required 60 square feet of bedroom space per occupant is maintained for the children in care. This shall be accomplished by one of two alternatives:

a. Specific bedroom areas shall be assigned to be used exclusively by the children in care.

or

b. If bedroom areas are shared by children and adults, then the minimum square footage shall be maintained for all the residents in care.

5. The institution shall complete written incident reports concerning serious occurrences involving staff or residents.

a. Each report shall include the date and time of occurrence, the staff member or resident involved, the nature of the incident, and the circumstances surrounding it. A copy of the report shall be filed at

the institution and shall be available for review by the staff of the Licensing Branch.

6. Any incident which critically injures, permanently disables, or results in death to a resident shall be reported to the Licensing Branch within 24 hours or the next working day.

7. If adults are allowed responsibility for their own medication, the institution shall establish safeguards to prevent children in care from having access to the medications.

8. Adults in care shall have a tuberculosis test within 12 months prior to admission. A report of the skin test, with follow-up or a negative chest X-ray if appropriate, is mandatory. Any additional testing shall be based on recommendations of the Texas Department of Health or local public health authorities.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1791

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL.,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I.

Whether state licensing of child-care facilities operated by religious institutions violates the Free Exercise Clause of the First Amendment to the Constitution of the United States.

II.

Whether state licensing of child-care facilities operated by religious institutions violates the Establishment Clause of the First Amendment to the Constitution of the United States.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1791

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC., ET AL.,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Texas, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the ground that the federal question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a suit brought by the State of Texas to enforce provisions of the Human Resources Code requiring a state license for the operation of child-care facilities against the Corpus Christi People's Baptist Church, Inc. The licenses are required pursuant to Section 42.001, *et seq.* of the Texas Human Resources Code, whose purpose is to:

> protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for

> their safety and protection and by regulating the facilities through a licensing program. It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs.

Section 42.001; Jurisdictional Statement at A-87.

Appellants contend that they are not properly subject to the licensing provisions because Corpus Christi People's Baptist Church, Inc. is a religious organization, and licensing of its child care institutions impinges upon rights guaranteed by the Religion Clauses of the First Amendment.[1]

In a unanimous decision, the Supreme Court of Texas upheld the constitutionality of the state licensing of Appellant's child-care facilities as violative of neither the Free Exercise nor Establishment Clauses of the First Amendment to the Constitution of the United States. The court's opinion relied closely on well-established federal and state case law and the record below. At the conclusion of the opinion, Chief Justice Pope wrote:

> These cases have been debated and litigated for a number of years upon the claim that the State seeks to regulate religion. This record and those of the prior cases show that the issue is a spurious one. The State has manifested complete disinterest in the religious doctrines that People's Baptist has in the past or may in the future expound. The homes can comply with the law's modest requirements that are mandatory for all other homes. A decision to close the homes will be that of People's Baptist, not the State.

Jurisdictional Statement at A-7 - A-8.

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[1]This claim has twice been decided adversely to the Appellants. *Roloff Evangelistic Enterprises, Inc. v. State*, 556 S.W.2d 856 (Tex.Civ.App.--Austin 1977, writ ref'd n.r.e.), *app. dism'd for want of substantial federal question*, 439 U.S. 803 (1978); *Oxford v. Hill*, 558 S.W.2d 557 (Tex.Civ.App.--Austin 1977, writ ref'd). In both cases, the Texas child-care licensing statute was upheld as constitutional when applied to child-care facilities operated by religious institutions.

Appellant's motion to the Supreme Court of Texas for rehearing was denied. This appeal followed.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE DECISION BELOW SHOULD BE AFFIRMED

Appellants seek compulsory review by appeal pursuant to 28 U.S.C. § 1257(2). Jurisdictional Statement at 2. This Court has repeatedly stated that for a state court decision to be brought to this Court for review, a substantial federal question must be involved. Where a federal question has been explicitly foreclosed by a decision or decisions of the Supreme Court so as to leave no room for real controversy, the decision will not be brought to this Court for review. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902); *Zucht v. King,* 260 U.S. 174, 176-7 (1922).

Appellants essentially bring two questions to the Court: whether state licensing of child-care facilities operated by a religious institution violates either the Free Exercise or Establishment Clause of the First Amendment. Neither question is substantial. Appellants' contentions to the contrary are without merit.

A. State Licensing of Child-Care Facilities Operated by Religious Institutions Clearly does Not Violate the Free Exercise Clause of the First Amendment and, Thus, a Substantial Federal Question is Not Raised

The Texas Supreme Court adopted and applied traditional principles of Free Exercise Clause analysis. Under the First Amendment to the Constitution of the United States, the freedom of Appellants to *believe* as they may see fit remains inviolate, but their freedom to *act* in society is not inviolate and is subject to reasonable regulation by the State for the protection of the society which extends the right of religious freedom. *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972); *Sherbert v. Verner,* 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut,*

310 U.S. 296, 303-4 (1940); *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Thus, government regulation may lawfully impose an incidental burden on otherwise protected religious conduct.

The Texas Supreme Court correctly elucidated the balancing test traditionally employed to determine the propriety of government regulation where there is an apparent conflict between interests of public welfare and freedom of religion.

> First, the party complaining of a Free Exercise Clause violation must show that the regulations under review impose a substantial burden on the exercise of his religion. Second, if the complaining party demonstrates that it is burdened by the regulations, then the State must have a compelling state purpose for the laws. Relevant to this prong of the test is an inquiry into whether there exists a less restrictive alternative to the regulation.[2]

Jurisdictional Statement at A-5. (The Texas Supreme Court citing *Yoder*, 406 U.S. at 221, *Sherbert*, 374 U.S at 403, 406.)

Upon review of the relevant federal and state law and the record, the Texas Supreme Court held that "the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm." Jurisdictional Statement at A-6. Further, the court held that this compelling state interest outweighs the burden imposed upon the Appellants by the licensing requirement. *Id.*

In finding a compelling state interest, the Texas Supreme Court properly turned to prior cases which recognized a broader and greater state interest in the reasonable regulation of acts performed in accordance with religious beliefs where the welfare

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[2] In a recent discussion of the Free Exercise Clause, the Court did not even reach the balancing test as the claimant did not meet the threshold determination that a sufficient burden had been created. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 53 U.S.L.W. 4489, 4493 (1985) (minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act when applied to religious organizations held not to infringe on rights protected by the Free Exercise Clause).

and safety of children was involved. *Prince v. Massachusetts*, 321 U.S. 158, 168, 169 (1944); *see also Jones v. Alexander*, 59 S.W.2d 1080, 1081 (Tex. 1933).

The state interest in the protection of children is particularly compelling where child-care facilities are involved.

> The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of these children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled by the institution. The staff at the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives.

Jurisdictional Statement at A-6.

The state's interest in assuring that the basic needs and basic rights of children in child-care facilities are met and protected is supported in federal and state law. In *Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102 (Kan. 1980), *app. dism'd for want of substantial federal question*, 449 U.S. 802 (1980), the Kansas Supreme Court faced a similar challenge to the state's licensing of religious child-care facilities. There, the court found:

> The compelling interest of the state, as *parens patriae*, is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the state must protect.

Id. at 1112.

The Texas Supreme Court correctly construed the record and

legislative intent and history of the state regulation as affording the least restrictive and effective means of protection of children in child-care facilities.

> Licensing and regulation of child-care facilities are the least restrictive of the alternatives that the State could provide for the protection of children. Without these procedures the State could not gather vital information about a child-care facility that it must have to fulfill its duty to protect the health and well-being of the children residing there. No entity other than the State can carry out these responsibilities for the public.

Jurisdictional Statement at A-7.

The Human Resources Code explicitly protects religious child-care facilities from State intrusion into protected areas. Sec. 42.001 expresses the intent of the legislature that freedom of religion is inviolate and cautions that "... nothing in this chapter gives a governmental agency authority to regulate, control, or supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization." Jurisdictional Statement at A-87. Sec. 42.042(k) explicitly prohibits the State from regulating or attempting to regulate or control "the content or method of any instruction or curriculum of a school sponsored by a religious organization." Jurisdictional Statement at A-97.

Thus, the Texas Supreme Court adopted and correctly applied the traditional Free Exercise Clause analysis in determining that the compelling state interest in protecting children in child-care facilities outweighs the burden imposed upon the Appellants by the licensing requirements. *See also Roloff Evangelistic Enterprises, Inc. v. State,* 556 S.W.2d 856 (Tex.Civ.App.--Austin 1977, writ ref'd n.r.e.). *app. dism'd for want of substantial federal question,* 439 U.S. 803 (1978); *Oxford v. Hill,* 558 S.W.2d 557 (Tex.Civ.App.--Austin 1977, writ ref'd) *Kansas ex rel O'Sullivan v. Heart Ministries, Inc.,* 607 P.2d 1102 (Kan. 1980), *app. dism'd for want of substantial federal question,* 449 U.S. 802 (1980).

B. State Licensing of Child-Care Facilities Operated by Religious Institutions Clearly does Not Violate the Establishment Clause of the First Amendment and, Thus, a Substantial Federal Question is Not Raised

The Supreme Court of Texas correctly determined that the Free Exercise Clause represents a more appropriate and direct vehicle through which to question the constitutionality of the state regulation than does the Establishment Clause. Jurisdictional Statement at A-4. Nonetheless, the Court applied the appropriate standard for assessing establishment clause challenges: the three pronged-test espoused in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 238 n.6 (4th Cir. 1984). Under that analytical test, the challenged legislation fails constitutionally unless it is found to have a secular legislative purpose, to have a primary effect that does not advance or inhibit religion, and to have no potential for fostering excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13; Jurisdictional Statement at A-3.

The court then noted that Appellant's reliance on the Establishment Clause was misplaced. The court distinguished Establishment Clause cases:

> The Establishment Clause cases address the issue of whether some form of goverment *aid*, either direct or indirect, to a religious institution violates the Establishment Clause. See e.g. *Mueller v. Allen*, [463 U.S. 388 (1983)] (statute allowing parents tax deduction for expenses incurred in sending their children to parochial schools); *Lemon* (statute providing state aid in form of salary supplements, textbooks and instructional material for nonsectarian subjects); *Walz [Walz v. Tax Commission*, 397 U.S. 664 (1979)] (statute granting property tax exemptions to religious organizations for religious properties).

Jurisdictional Statement at A-3 - A-4.

The instant case, by contrast, involves government *regu-*

lation. Such a distinction leads to two logical conclusions, each of which undermines Appellant's reliance on the Establishment Clause. First, the court noted:

> Requiring nonreligious child-care facilities to comply with the state licensing and regulatory scheme while exempting religious facilities would result in unequal state treatment of the two classes of institutions. This unequal treatment could, arguably, be impermissable under the second-prong of the Establishment Clause test because the primary effect would be to advance religion.

Jurisdictional Statement at A-4.

Second, the Court distinguished the type of entanglement discussed in traditional Establishment Clause cases and that discussed by Appellants.

> In those cases, the State must examine and determine what programs are religious and what programs are secular to ensure that government aid reaches only the nonreligious ones. In our case, the state regulatory scheme prohibits inquiry into the religious content of the homes' curriculum. The purpose of these regulations is to assure that all child-care facilities, secular and nonsecular, meet certain minimum standards in areas such as financial solvency, staff-child ratio, nutrition and medical care.

Jurisdictional Statement at A-4.

Accordingly, the court held that state licensing of child-care facilities does not violate the Establishment Clause of the First Amendment. This determination, as shown, is supported by both federal law and the record.

CONCLUSION

For all the reasons stated herein, this appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1984, to all counsel of record as of this date.

_____

MARY F. KELLER
Special Assistant Attorney
General

Supreme Court, U.S.
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CLERK

No. 84-1791

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,
Appellants,

v.

STATE OF TEXAS,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The Motion to Dismiss or Affirm seeks to persuade the Court to proceed *summarily* to give its sanction to the discontinuance of a successful lifeline to children in severe crisis. This is on the presumed ground that the State knows solely how such children may be protected and regenerated, though this record belies such presumption. Hence no non-conforming methodology may be tolerated in Texas, even one dictated by salutary religious principle in a non-tax-dependent ~~faee~~ faith community, which indeed recognizes a legitimate State interest in child protection, and whose work the Texas Supreme Court praises.

As will be seen (pages 2-3 *infra*), the core problem at this stage of the litigation is the State's masking of the record. The record obliterates the State's pretension that the regulatory scheme is other than highly intrusive, arbitrary and value-laden. It is the plea of the appellants that the Court, at the very least, explore the record and then the legal issues (which can be comprehended only in the light of that record).

The Church's homes at this time continue to save lives and represent a last resort for parents desperate to prevent the loss of children, many of whom have been failed by the imposed uniform methodology of State-run or State-licensed programs. All three courts below, (including the Texas Supreme Court) have, by their orders, recognized the irreparable harm that would result were the homes shut down. The Church and parents have no lobby whereby a statute could be inacted with rational exemptive provisions, nor the funds needed, in this era of costly pressure group lobbying, to achieve such major legislation.

The State, in its Motion to Dismiss or Affirm, relies solely upon the proposition that prior decisions of this Court have "explicitly foreclosed" the questions presented by appellants. (Motion to Dismiss or Affirm (hereinafter "Motion"), 3). From Pages 3 to 8 the Motion cites decisions of this Court which the State considers to be controlling precedent. The Jurisdictional Statement discussed these cases and showed that none of them can have the preclusive effect claimed for them by the State, but that several of them, against the background of the trial record herein, indeed point to the need for plenary consideration of this case by the Court. For additional reasons the Motion should be denied:

1. Ignoring of the Trial Record. The State's Motion perpetuates the Texas Supreme Court's ignoring of the detailed record made upon trial. Hence, viewed solely through the lens of the State's Motion, no substantial

federal question is visible. But ". . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293 (1941) (per Frankfurter, J.). As clearly appears from a reading of the Jurisdictional Statement and the Appendix thereto, the State's position in its Motion is one of screening off the realities at the heart of this case which witness after witness (including State officials) established in the trial court. As this Court stated in *Whitus v. Georgia,* 385 U.S. 545, 550 (1967):

> "There is no question as to the constitutional principle — the question involved is its application to the facts disclosed in the record. It is our province to 'analyze the facts in order that the appropriate enforcement of the federal right may be assured,' Norris v. Alabama, 294 U.S. 587, 590 . . ., and while the conclusions reached by the highest court of the state 'are entitled to great respect . . . it becomes our solemn duty to make independent inquiry and determination of the disputed facts . . .' "

Such a duty is clearly presented here since the trial record contradicts the critically important conclusions reached by the court below regarding the specific claims made by appellants respecting religious exercise, real injury thereto, compelling societal interest, and less restrictive means. The call for this Court's independent inquiry is made even more demanding by the failure of the court below even to have acknowledged the important claims made by the intervening parents, children and staff.

2. *Ignoring of Issues Raised by Parties.* Unaccountably, the Motion states:

> "Appellants essentially bring two questions to the Court: whether state licensing of child-care facilities operated by a religious institution violates either the Free Exercise or Establishment Clause of the First Amendment."

Motion, 3. But the Jurisdictional Statement brings four other questions to the Court. These, of their nature, do not admit of being telescoped into the two issues to which the State desires to confine this appeal. Those familiar with the Church's homes and methodology, as clearly disclosed in detail upon the record, know how insistent is the demand of the parents whose children are placed there that those homes and that methodology continue to sustain and regenerate their children, however distinct that methodology may be from the methodology of the State. It is scarcely credible that the State, instead of being willing to present argument against the substantiality of the questions presented on parental choice, rights of the children, and vocational liberties of staff members, would simply inform this Court that these are non-issues.

3. *Misconception of Effect of Summary Affirmance.* The State's Motion treats as binding precedents certain summary affirmances by this Court in prior cases, *e.g., Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980). This Court has, however, often stressed:

> "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached."[1]

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1. And see *Anderson v. Celebrezze*, 460 U.S. 780, 784 fn. 5 (1983) wherein the Court characterized its summary affirmances in

Fusari v. Steinberg, 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 949 (1982). As has been shown in the Jurisdictional Statement, the summary affirmances cited by the State in support of its contention that they "leave no room for real controversy" (Motion, 3) on this appeal were made in cases clearly distinguishable from the present case.

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certain previous cases as "a rather slender reed" for purposes of precedent. The Court continued:

> "We have often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."

CONCLUSION

For all of the reasons stated herein and in the Jurisdictional Statement, the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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